You are invited to attend the next program of the
Theodore Roosevelt American Inn of Court

IMMIGRATION IN A COVID-19 WORLD

Via ZOOM

Program Committee

Chair: Hon. Randall T. Eng
Taniesha Allen, Esq.
James Druker, Esq.
Scott Druker, Esq.
Harry Kutner, Esq.
Robert Zausmer, Esq.

Law Students
St. John's University School of Law
Mollie Carney, Elizabeth Sheehan, Matthew Vani

WHEN: Tuesday, February 23, 2021

TIME: 6:00 PM

PRE-REGISTRATION IS REQUIRED FOR THIS PROGRAM
Register at: https://us02web.zoom.us/meeting/register/tZAsdu-hqzsuHdDkaETCZidofpHPlp9hjxlu

After registering, you will receive a confirmation email containing information about joining the meeting as well as materials for the program.

**** CLE CREDITS HAVE BEEN REVISED FOR THIS PROGRAM****
Skills - .75
Professional Practice - .75
Ethics and Professionalism - .25
Law Practice Management - .25

CLE AVAILABLE ONLY FOR PAID MEMBERS OF THE INN

PROGRAM NOTICE

IMMIGRATION IN A COVID-19 WORLD

DATE OF PRESENTATION: February 23, 2021 at 6:00 – 8:00 P.M.

PLACE OF PRESENTATION: Zoom (to be provided)

INN OF COURT COMMITTEE
IMMIGRATION IN A COVID19 WORLD – BIO'S

Hon. Randall T. Eng

Of Counsel at Meyer, Suozzi, English & Klein, P.C. and former Presiding Justice, Appellate Division, Second Department; Associate Justice, AD2; Justice of the Supreme Court, Queens County; Judge, New York City Criminal Court; Inspector General, New York City Department of Correction; Assistant District Attorney, Queens County; Adjunct Professor of Law at St. John's University.

Hon. Randall T. Eng
Meyer Suozzi English & Klein, P.C.
990 Stewart Avenue – Suite 300
Garden City, New York 11530
(516) 741-6565

Robert Zausmer

I was admitted to practice in 1974. I started my career with the Nassau County District Attorney in September 1973 (before I was formally admitted to the Bar) and worked there in the Appeals, County Court Trial Bureau and Major Offense Bureau until I left to enter private practice in January 1979. Since then, I have been a commercial litigator handling virtually any type of commercial litigation. I also have litigated cases involving Trusts and Estates in Surrogate Court and represented attorneys in Disciplinary proceedings before the Grievance Committee. I was a Partner at MSEK for over 30 years until I departed that firm in March 2019. I now work at Falcon, Rappaport & Berkman, a firm in Rockville Centre, where almost every lawyer is in his or her early 30's. My role there is litigator, mentor and provider of advice as to how to raise young children.

Taniesha Allen

Taniesha Allen is an associate attorney with the Hofstra Law Center for Children, Families, and the Law. She primarily assists low income families with SCPA 17-A guardianships. She also serves as attorney for AIP and court evaluator in Article 81 guardianships. In addition, Taniesha regularly serves as a volunteer attorney for the Nassau Suffolk Law Services Committee Volunteer Lawyers Project where she helps low income clients facing evictions. She received a Bachelor's degree in Business Administration and Economics from Stony Brook University in 2012 and her Juris Doctorate from Hofstra University in 2016.

Harry H. Kutner, Jr.

Admitted for 47 years and still putting in long hours, Mr. Kutner followed a now by gone route of practicing both civil and criminal law, in both federal and state courts, on the trial and appellate level. Extensive notable trial results have been achieved in civil rights, medical malpractice, personal injury and construction accidents, contract and collection, and criminal, all with a keen eye of recognition of legal issues mated with an unrelenting client representation.

Honored to be an early member of the Inn upon the personal invitation of the late inestimable Hon. Arthur D. Spatt, he enjoys training law students and young attorneys, evidenced by his frequently being a Program participant and the impetus for the Inn-Sight Series.

HARRY H. KUTNER, JR.
1325 Franklin Avenue - Suite 225
Garden City, New York 11530
(516) 741-1400

Matthew Vani is a second-year student at St. John's University School of Law. He graduated from the Cornell University School of Industrial and Labor Relations in 2019. At St. John's, he is the Director of Student Outreach for the Labor Relations & Employment Law Society and a staff member on the New York International Law Review. This past summer, he interned for the Hon. Leonard Livote in Queens Supreme Court Commercial Division.

Matthew Vani
St. John's University School of Law
Candidate for J.D., 2022
516-592-7406

PROGRAM OUTLINE:
TIMED PROGRAM AGENDA

IMMIGRATION IN A COVID-19 WORLD

7 minutes	Opening remarks by Justice Randall Eng (ret.) as to the use of immigration policies in furtherance of political agendas in the midst of a global pandemic. A word about 8 USC Ch 7 Exclusion of Chinese, first enacted May 6, 1882 and repealed December 17, 1943.
7 minutes	Remarks by JAMES DRUKER on diversity trends in the US population.
15 minutes	An overview of ASYLUM by ROBERT ZAUSMER including historical, legal and political issues.
7 minutes	Presentation by TANIESHA ALLEN on FAMILY SEPARATIONS in the former and current administrations.
12 minutes	SKIT illustrating challenges faced by Central American family seeking asylum in the United States.
12 minutes	Overview of DACA (Deferred Action for Childhood Arrivals) by HARRY KUTNER.
7 minutes	Review of significant court decisions concerning DACA by MOLLIE CARNEY.
12 minutes	SKIT illustrating challenges faced by DACA applicant.
5 minutes	JUSTICE ENG concluding remarks, including the rescission of the Trump travel ban orders.

DACA Timeline

- June 2012
  - Janet Napolitano, the secretary of Homeland Security under President Obama, issued a three-page memo announcing a policy of "exercising prosecutorial discretion with respect to individuals who came to the United States as children." In most instances, "these individuals lacked the intent to violate the law" when they entered the country illegally, she said.
  - Under the new program, Homeland Security said it would "defer" deportation action against qualified individuals "for a period of two years, subject to renewal." During that time, individuals would be permitted to work legally.
  - The memo specified that to qualify applicants must:
    - Have come to the United States under age 16;
    - Not be above the age of 30;
    - Have "continuously resided" in the U.S. for at least five years;
    - Be in school or had graduated, or had served in military; and,
    - Have not been convicted of a "felony offense or significant misdemeanor."

- November 2014
  - Jeh Johnson, President Obama's secretary of Homeland Security in his second term, announced a significant expansion of "deferred action" that would extend relief to as many as 4 million parents of U.S. citizens or permanent residents. (DAPA)

- February 2015 (*U.S. v. Texas*)
  - U.S. District Judge Andrew Hanen in Brownsville, Texas, issued a nationwide injunction to prevent the DAPA policy from taking effect. He was acting on a lawsuit brought by lawyers for Texas and 25 other states, all of which had Republican governors. They had alleged the DAPA policy was illegal because Congress had not granted such broad relief.
  - Affirmed by 5th cir. (5-4), and SCOTUS (4-4)

- September 2017
  - Elaine Duke, the acting secretary of Homeland Security for President Trump, issued a memo announcing the "rescission of Deferred Action for Childhood Arrivals."
  - The Trump administration rescinds DACA; the then-acting Homeland Security Secretary Elaine Duke announced on September 15, 2017 that DACA would be phased out for current recipients and that no new requests for temporary protection from deportation under DACA would be granted.

- January 2018 (*Dep't of Homeland Security v. Regents of the University of California*)
  - U.S. District Judge William Alsup in San Francisco issued a nationwide order blocking the Trump administration's repeal of DACA. He said it was "based on a flawed legal premise" that the Obama-era policy was illegal. The judge acted on lawsuits brought by California and several other Democratic-led states. Judges in

New York and Washington, D.C., later handed down similar orders, and the 9th Circuit Court in San Francisco affirmed Alsup's order in November.
    - Due to the January 9, 2018 federal court order for preliminary injunction, USCIS announced on January 13, 2018 that the agency, "has resumed accepting requests to renew a grant of deferred action under DACA. Until further notice, and unless otherwise provided in this guidance, the DACA policy will be operated on the terms in place before it was rescinded on Sept. 5, 2017.

- June 2019
    - The Supreme Court announced it will hear the Trump administration's appeal in three consolidated cases, led by the California case known as Department of Homeland Security vs. Regents of the University of California. The court agreed to decide "whether DHS's decision to wind down DACA is lawful."

- June 2020 (*Dep't of Homeland Security v. Regents of the University of California*)
    - Supreme Court ruled (5-4) that DHS's rescission of DACA violated the Administrative Proeedure Act (APA) because the agency did not provide a reasoned explanation for its action.
        - Rescission arbitrary and capricious
        - Did not address whether DACA was legal or sound policy, explicitly states "the dispute is instead primarily about the procedure the ageney followed in [rescinding DACA]"
    - This decision "restores DACA to its pre-September 5, 2017 status"

- July 17, 2020 (*Casa de Maryland v. U.S. Dep't of Homeland Security*)
    - Judge Grimm in the U.S. District Court in Maryland ordered that the Trump administration begin accepting new applicants (prior to this decision USCIS was renewing DACA status but not accepting new applications)

- July 28, 2020- Wolf Memorandum
    - Acting Secretary of Homeland Security Chad F. Wolf announced that in response to the Supreme Court's decision, the Department of Homeland Security will take action to thoughtfully consider the future of the DACA policy, including whether to fully rescind the program.
    - In the interim, the Department of Homeland Security would make the following changes to DACA immediately:
        - Reject all initial requests for DACA and associated applications for Employment Authorization Documents;
        - Reject new and pending requests for advanced parole absent exceptional circumstances; and,
        - Limit the period of renewed deferred action granted pursuant to the DACA policy after the issuance of this memorandum to one year.

- November 14, 2020 (*Batalla Vidal v. Wolf*)
    - Judge Garaufis in the E.D.N.Y. held Wolf was not lawfully serving as the Acting Secretary of Homeland Security when the Wolf Memorandum was

issued, because the Department of Homeland Security failed to follow its order of succession, as lawfully designated under the Homeland Security Act.

- December 4, 2020 (*Batalla Vidal v. Wolf*)
  - Judge Garafius in the E.D.N.Y. held that because Wolf was not lawfully serving as the Acting Secretary of Homeland Security when the Wolf Memorandum was issued (per November 14 decision), the Wolf Memorandum is vacated, and DACA is currently governed by its terms "as they existed prior to the attempted rescission of September 2017."
  - The court also ordered DHS post a public notice, within three days of the order, to be displayed prominently on its website and on the websites of all other relevant agencies, that it is accepting first-time requests for consideration of deferred action under DACA, renewal requests, and advance parole requests, based on the terms of the DACA program prior to September 5, 2017, and in accordance with this court's Memorandum & Order of November 14, 2020. The notice must also make clear that deferred action and employment authorization documents ("EADs") granted for only one year are extended to two years, in line with the pre-Wolf Memorandum policy.

- January 2021- Biden issues "Preserving and Fortifying Deferred Action for Children Arrivals"
  - The Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA.

United States Asylum Policy Research
Matt Vani and Elizabeth Sheehan

I. Background of the United States Asylum System

According to the Universal Declaration of Human Rights, the right to seek asylum is a fundamental human right. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948). In order to qualify for asylum in the United States, an individual must meet the definition of a "refugee." 8 U.S. Code § 1101(42). A refugee is a person who is unable or unwilling to return to his or her home country because of a "well-founded fear of persecution" due to race, membership in a particular social group, political opinion, religion or national origin. Id. Further, an asylum-seeker must be present in the United States or seeking entry and asylum at the border. 8 U.S.C. § 1158(a)(1).

Under 8 U.S.C.S. § 1157 the President sets the cap for the number of refugees that can be admitted to the United States in a fiscal year based on humanitarian concerns or in the national interest. However, there is no cap on asylum-seekers.

II. Asylum Laws

A. Statutes

Refugee - a person who is unable or unwilling to return to his or her home country because of a "well-founded fear of persecution" due to race, membership in a particular social group, political opinion, religion, or national origin

- This definition comes from United Nations 1951 Convention and 1967 Protocols relating to the Status of Refugees of which the US is a party
- This definition is also in the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 Section 42)

8 U.S.C. – Refugee Act

- Filed as an amendment to the Immigration and Nationality Act
- Incorporated the definition of refugee into US law and provided the legal basis for today's U.S. Refugee Admissions Program (USRAP)

- § 1522 Establishes a refugee resettle program including a permanent procedure for admitting refugees to the United States for humanitarian reasons.

8 U.S.C.A. § 1158 Asylum

- The Immigration and Nationality Act (INA) sets forth the procedures for the application of asylum
- § 1158 (b)(1)(A) The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) - established the expedited removal process

- The Act mandates that immigrants who are unlawfully present in the U.S. for 180 days but under 365 days must remain outside the United States for three years unless pardoned
- The act allows for the deportation of undocumented immigrants who commit a misdemeanor or felony
- Individuals arriving in this country without valid entry documents may be summarily returned to their countries of origin "without further hearing or review."
- Persons with credible fear were screened out of expedited removal. Credible fear is a lower threshold than well-founded fear.
- 8 U.S.C. § 1225

B. Department of Homeland Security (DHS) Regulations

Credible Fear of Persecution and Torture Determinations "Lesson Plan"

- The "Lesson Plan" directs Asylum Officers on how to make credible fear determinations.
- History of recent revisions: April 14, 2006; March 7, 2013; February 28, 2014; February 13, 2017; April 30, 2019; September 30, 2019
- *See. Kiakombua v. Wolf*, 19-CV-1872 KBJ, 2020 WL 6392824 (D.D.C. Oct. 31, 2020).

Asylum Cooperative Agreements - "Safe third country agreements"

- Pursuant to the Immigration and Nationality Act § 208(a)(2)(A) the Attorney General may bar asylum seekers from applying for asylum within the United States, and remove them to a country pursuant to a bilateral or multilateral agreement.

III. Evolution of Asylum under the Trump Administration

A. Timeline

January 25, 2017: Executive Order 13767 Border Security and Immigration Enforcement Improvements

- Called for a wall on the Southern border of the United States and additional detention centers to be built near the border
- "The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico." *8794
- "It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens." *8796
- Section 5 (Detention Facilities) directs the Secretary to assign asylum officers to detention facilities to conduct credible fear determinations, which is an essential component of the asylum process (8 U.S.C. § 1225(b)(1))
- Section 11 (parole, asylum, and removal) directs the Secretary to take action to ensure asylum referrals and credible fear determinations "are conducted in a manner consistent with the plain language of those provisions"
- Citation: 82 FR 8793

January 25, 2017: Executive Order 13768 Enhancing Public Safety in the Interior of the United States

- Penalizes sanctuary cities who refused to comply with immigration enforcement by declaring them ineligible for Federal grants from the Department of Homeland Security and other parts of the Federal government
- Citation: 82 FR 8799

February 2017: USCIS raises the threshold for demonstrating credible fear in asylum interviews

- These interviews are required before an asylum seeker is able to present a claim to an immigration judge
- Eliminates exemption for Cubans from Expedited Removal
- Removes the guidance that "[w]hen there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination," (Section II, Background; pp 6-12)
- Removes the "significant possibility" language from the discussion of the applicant establishing identity and credibility. (Section VI, Credibility; pp. 18-23, 47)
- https://www.aila.org/infonet/uscis-executive-summary-of-changes-to-the-credible

July 2017: ICE ends the Family Case Management Program

- Family Case Management Program was launched in 2016 with the goal of keeping asylum seeking families together
- Under the program, families who passed a credible fear interview and were determined to be good candidates for a less-secure form of release — typically vulnerable populations like pregnant women, mothers who are nursing or moms with young children — were given a caseworker who helped educate them on their rights and responsibilities
- The program was ended by the Trump administration
- https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896

March 2018: Attorney General Jeff Sessions vacates decision in Matter of E-F-H-L

- This decision eliminated the rights of asylum seekers to testify on their behalf
- 27 I&N Dec. 226 (A.G. 2018)

April 2018: Attorney General Jeff Sessions announces a "zero-tolerance" policy regarding arriving migrants under 8 U.S.C. 1325(a)

- a new "zero-tolerance policy" for offenses under 8 U.S.C. § 1325(a), which prohibits both attempted illegal entry and illegal entry into the United States by an alien.
- This policy leads to mass family separations as parents are prosecuted and children are taken into custody
- Department of Justice issued this policy via press release 18-417

June 2018: Attorney General Jeff Sessions overrules the decision in Matter of A-B-

- An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.
- This decision limited the availability of asylum for survivors of domestic violence and gang violence.
- 27 I&N Dec. 316 (A.G. 2018)

September 2018: Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy is released

- This report explains the policy of metering which is turning back asylum seekers at points of entry and forcing them to wait on lines for weeks
- The report explains how metering leads to less asylum seekers and may have led to more illegal border crossings
- OIG-18-84

November 2018: Asylum Ban 1.0

- Interim Final Rule published by the DOJ and DHS proclaiming "aliens subject to such a proclamation concerning the southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum"
- 83 FR 55934
- DC Federal Court declared the rule illegal
- O.A. v. Trump, 404 F. Supp. 3d 109 (D.D.C. 2019)

January 24, 2019: Migrant Protection Protocols

- The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.
- DHS Memo https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols

April 30, 2019: USCIS revised the Credible Fear "Lesson Plan"

- *Kiakombua v. Wolf*, 19-CV-1872 KBJ, 2020 WL 6392824 (D.D.C. Oct. 31, 2020)(vacating "The Lesson Plan" because some provisions conflate the requirements set forth in the INA and cannot be severed from the document).

May 2019: USCIS memo on Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children released

- This memo makes it more difficult on unaccompanied children seeking seeking asylum
- "As the party invoking USCIS jurisdiction, the individual filing for asylum bears the burden to establish that he or she met the UAC definition"
- HQRAIO 120/12a
- In 2019 a Federal District court issued an Temporary Restraining Order regarding the implementation of the memo

July 16, 2019: Asylum Eligibility and Procedural Modifications

- Departments of Justice and Homeland Security published an interim final rule altering asylum eligibility under 8 C.F.R. 208.13(c) and 8 C.F.R. 1208.13(c) for asylum-seekers entering the United States via the southern border. The rule bars an individual from applying for asylum unless he or she applied for asylum in a third country passed through en route to the United States.
- Citation: 84 FR 33829
- *Capital Area Immigrants' Rights Coal. v. Trump ("CAIR II")*, --- F. Supp. 3d ---, 2020 WL 3542481 (D.D.C. June 30, 2020)(holding the interim final rule is a violation of the Administrative Procedure Act and Due Process under the Fifth Amendment).

- *East Bay Sanctuary Covenant v. Barr*, 588 U.S. _ (Sept. 11, 2019)(reinstating the interim rule).

September 26, 2019: Enhancing State and Local Involvement in Refugee Resettlement (EO 13888)

- Established an "opt-in" system where states and localities must give affirmative consent for refugees to be resettled in that jurisdiction.
- *HIAS, Inc. v. Trump* (Jan. 8 2021) WL 69994 - Affirmed the District Court's grant of a preliminary injunction enjoining EO 13,888 as a violation of the Refugee Act (8 U.S.C.S. § 1522) because it effectively supplanted the Act's established process for asylum.

November 14, 2019: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

- DHS proposed to establish a $50 fee for asylum applications (Form I-589) filed with USCIS. The regulation would also increase other fees charged by USCIS by an average of 20%.
- Citation: 84 FR 62280

November 19, 2019: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act

- Modified existing regulations to provide for the implementation of Asylum Cooperative Agreements (ACAs) with Guatemala, Honduras, and El Salvador. Under the rule, DHS asylum officers have authority to make thresholds determinations as to whether individuals are eligible for asylum pursuant to those agreements.
- Citation: 84 FR 63994

June 2020: *Department of Homeland Security v. Thuraissigiam*

- Facts: The defendant was a member of the Tamil population in Sri Lanka, and apprehended within 25 feet of the U.S. southern border. An asylum officer determined Thuraissigiam had not established a credible fear of persecution.
- Issue: Whether an asylum seeker can file in federal district court a petition for habeas corpus to review the asylum officer's decision.
- Holding § 1252(e)(2) does not violate the suspension clause and due process clause. The decision confirmed limited and narrow judicial review over expedited removal.

Commented [1]: This decision holds increased weight given the stringent immigration policies implemented during the Trump administration.

August 3, 2020: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

- DHS published a final rule in the Federal Register effective October 2, 2020, significantly altering the USCIS fee schedule establishing a $50 fee for Form I-589.
- Citation: 85 FR 46788

- *Immigrant Leg. Resource Ctr. v. Wolf*, 20-CV-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020)(granting a motion for a preliminary injunction).

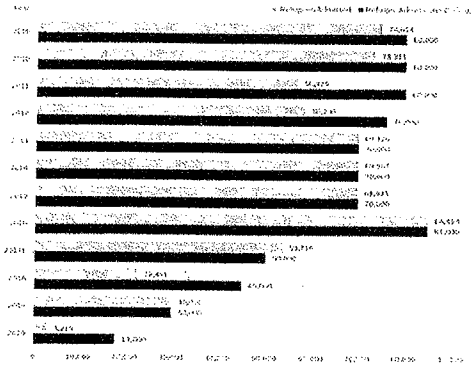
December 17, 2020: Asylum Eligibility and Procedural Modifications

- Published a final rule modifying the interim final rule published on July 16, 2019.
- Citation: 85 FR 82260

B. Implications of the COVID-19 Global Pandemic.

Under the IIRIRA, an individual seeking asylum must apply within one year of his or her arrival into the United States. 8 U.S.C. § 1158(a)(2)(B). With the onset of the global COVID-19 pandemic, in-person hearings and interviews with USCIS were temporarily suspended. Further, public health efforts to contain the virus have reduced access to transportation, legal services, and technology impairing an asylum seeker's ability to file an application in accordance with the IIRIRA.

- Impact of COVID-19 on the Immigration System (ABA summaries): https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/
- Impact of COVID-19 on the 1-Year Asylum Ban: https://plus.lexis.com/api/permalink/66353e6e-586d-46d4-be08-61a6537442a7/?context=1530671



https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy

DACA (Dreamers) 800,000

JAIRO

Born January 2002

Arrived undocumented from Mexico in February 2007 with father and mother.

Has lived continuously in New York City (Brooklyn and the Bronx)

Has two younger sisters both born in New York. Father has worked off the books doing construction and janitorial work. Mother has done off the books domestic work and child care.

Jairo has been arrested twice. Received YO treatment for Marijuana possession at age 17 and pleaded guilty to petit larceny (reduced from robbery 3) at age 19.

Application in March 2018 for DACA status. Is he qualified?

Assuming he gets DACA. Comes up for two year renewal in 2020.

Rules say you need to apply 150 days before expiration of status.

Sept. 5, 2017 AG Sessions announced that DACA was ending and implementation to be in 6 months. No more renewal applications.

Later in 2018 federal courts ordered feds to renew DACA.

Nov. 12, 2019 US Supreme Court blocked cancellation of DACA calling procedure arbitrary and capricious.

January 20, 2021, President Biden signs executive order reinstating DACA.

ASYLUM SKIT

Juan, Maria, and son Javier (age 10) and daughter Anna (age 8) have arrived in Juarez, Mexico from Nicaragua and seek asylum in the US at the El Paso, Texas Port of Entry. Maria has been extorted at home and threatened with kidnapping and assault by gang members who are aware that she has relatives in the US who could send money. Juan is employed in odd jobs and has not been personally threatened by gangs but is aware of their overtures to Maria.

Upon being medically screened, all four family members tested positive for Covid-19. Juan and Maria have mild symptoms while the children are both asymptomatic.

BRIEFING ROOM

Proclamation on Ending Discriminatory Bans on Entry to The United States

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

The United States was built on a foundation of religious freedom and tolerance, a principle enshrined in the United States Constitution. Nevertheless, the previous administration enacted a number of Executive Orders and Presidential Proclamations that prevented certain individuals from entering the United States — first from primarily Muslim countries, and later, from largely African countries. Those actions are a stain on our national conscience and are inconsistent with our long history of welcoming people of all faiths and no faith at all.

Beyond contravening our values, these Executive Orders and Proclamations have undermined our national security. They have jeopardized our global network of alliances and partnerships and are a moral blight that has dulled the power of our example the world over. And they have separated loved ones, inflicting pain that will ripple for years to come. They are just plain wrong.

Make no mistake, where there are threats to our Nation, we will address them. Where there are opportunities to strengthen information-sharing with partners, we will pursue them. And when visa applicants request entry to the United States, we will apply a rigorous, individualized vetting system. But we will not turn our backs on our values with discriminatory bans on entry into the United States.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(f) and 1185(a), hereby find that it is in the interests of the United States to revoke Executive Order 13780 of March 6, 2017 (Protecting the Nation From Foreign Terrorist Entry Into the United States), Proclamation 9645 of September 24, 2017 (Enhancing Vetting Capabilities and Processes for

Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), Proclamation 9723 of April 10, 2018 (Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), and Proclamation 9983 of January 31, 2020 (Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats). Our national security will be enhanced by revoking the Executive Order and Proclamations.

Accordingly, I hereby proclaim:

Section 1. Revocations. Executive Order 13780, and Proclamations 9645, 9723, and 9983 are hereby revoked.

Sec. 2. Resumption of Visa Processing and Clearing the Backlog of Cases in Waiver Processing. (a) The Secretary of State shall direct all Embassies and Consulates, consistent with applicable law and visa processing procedures, including any related to coronavirus disease 2019 (COVID-19), to resume visa processing in a manner consistent with the revocation of the Executive Order and Proclamations specified in section 1 of this proclamation.

(b) Within 45 days of the date of this proclamation, the Secretary of State shall provide to the President a report that includes the following elements:

(i) The number of visa applicants who were being considered for a waiver of restrictions under Proclamation 9645 or 9983 on the date of this proclamation and a plan for expeditiously adjudicating their pending visa applications.

(ii) A proposal to ensure that individuals whose immigrant visa applications were denied on the basis of the suspension and restriction on entry imposed by Proclamation 9645 or 9983 may have their applications reconsidered. This proposal shall consider whether to reopen immigrant visa applications that were denied due to the suspension and restriction on entry imposed by Proclamation 9645 or 9983, whether it is necessary to charge an additional fee to process those visa applications, and development of a plan for the Department of State to expedite consideration of those visa applications.

(iii) A plan to ensure that visa applicants are not prejudiced as a result of a previous visa denial due to the suspension and restriction on entry imposed by Proclamation 9645 or 9983 if they choose to re-apply for a visa.

Sec. 3. Review of Information-Sharing Relationships and a Plan to Strengthen Partnerships. Within 120 days of the date of this proclamation, the Secretary of State and the

Secretary of Homeland Security, in consultation with the Director of National Intelligence, shall provide to the President a report consisting of the following elements:

(a) A description of the current screening and vetting procedures for those seeking immigrant and nonimmigrant entry to the United States. This should include information about any procedures put in place as a result of any of the Executive Order and Proclamations revoked in section 1 of this proclamation and should also include an evaluation of the usefulness of form DS-5535.

(b) A review of foreign government information-sharing practices vis-à-vis the United States in order to evaluate the efficacy of those practices, their contribution to processes for screening and vetting those individuals seeking entry to the United States as immigrants and nonimmigrants, and how the United States ensures the accuracy and reliability of the information provided by foreign governments.

(c) Recommendations to improve screening and vetting activities, including diplomatic efforts to improve international information-sharing, use of foreign assistance funds, where appropriate, to support capacity building for information-sharing and identity-management practices, and ways to further integrate relevant executive department and agency data into the vetting system.

(d) A review of the current use of social media identifiers in the screening and vetting process, including an assessment of whether this use has meaningfully improved screening and vetting, and recommendations in light of this assessment.

Sec. 4. General Provisions. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of January, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.

JOSEPH R. BIDEN JR.

JUNE 28, 2018 3:20PM

Defenses of Separating Children from Parents—And Why They're Wrong

BY DAVID J. BIER

President Trump ordered the end of his child separation policy, and a court has ordered the reunification of parents who were separated from their children. The Department of Homeland Security (DHS) has said it will stop referring parents, but many conservatives felt that the family separation was a positive development in the fight against illegal immigration and even required by law, so here is a review of nine of their most common defenses of the policy.

1. "It's the law, and that's what the law states." -White House Press Secretary Sarah Huckabee Sanders

- *No, it doesn't, and in many cases, the law prohibits criminal prosecutions.*

No law requires immigrant children to be separated from their parents. Under the Trump administration's "zero tolerance" policy, DHS chose to refer to the Department of Justice (DOJ) twice as many border crossers—and far more parents—for prosecution for "improper entry" under 8 U.S.C. 1325. This law provides that "any alien who... attempts to enter the United States at any time or place other than as designated by immigration officers... shall... be fined... or imprisoned not more than 6 months." Those who claim that this statute requires separation must defend the view that it 1) requires referring all offenders for prosecution, 2) requires separating children during that referral, 3) requires prosecutors to seek jail time, and 4) allows no exceptions.

None of these four claims are true. 1) The "shall" in this statute doesn't require prosecution of every single offender, but rather limits the penalties to be imposed ("shall be... not more than"). As DOJ's own manual affirms, "the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute... [as] has been recognized on numerous occasions by the courts" (citing a half a dozen cases). The statute, however, specifies the maximum or minimum penalties should the prosecutor decide to prosecute. 2) In any case, nothing in this statute requires that—in the process of DHS's referral for prosecution—a parent be separated from their child, and 3) the statute explicitly allows prosecutors not to seek jail time. In response to an ACLU lawsuit, DOJ even admitted to the court that the detention and prosecution decisions are entirely "discretionary."

4) As importantly, 8 U.S.C. 1158 provides that "Any alien who... arrives in the United States (whether or not at a designated port of arrival...), irrespective of such alien's status, may apply for asylum..." In other words, it is completely *legal* for illegal immigrants to apply for asylum not at a designated port of entry. Congress enacted the statute permitting asylum in 1980 *after* it criminalized improper entry in 1952, indicating that it did not envision asylees being prosecuted. Moreover, the United States is a party to the United Nations 1951 Refugee Convention. Article 31 prohibits, with some exceptions, "penalties, on account of illegal entry or presence" on refugees because "the seeking of asylum can require refugees to breach immigration rules." The DHS Office of Inspector General has found prosecuting asylum seekers at the border "may violate U.S. treaty obligations" under the Convention.

Congress has certainly never made it mandatory to separate families. In fact, the House Committee on Appropriations in 2005 under Republican control stipulated in its report attached to the annual appropriations bill that it "expects DHS to release families or use alternative to detention such as the Intensive Supervised Appearance Program whenever possible," and that if detention is temporarily necessary or otherwise unavoidable, it "directs DHS to use appropriate detention space to house them together."

2. "If you are seeking asylum for your family, there is no reason to break the law and illegally cross between ports of entry." -DHS Secretary Kirstjen Nielsen

- *False. Secretary Nielsen has admitted DHS is turning back many asylum seekers at ports of entry and that it is still separating many families who are admitted at ports.*

In January 2017, the American Immigration Council (AIC) filed a complaint about the DHS's practice of turning away asylum seekers at ports of entry. Human Rights First documented numerous other cases in May 2017, concluding that the policy "is pushing some asylum seekers to dangerously cross the border between formal entry points." In July, AIC filed a class action lawsuit challenging the policy. In December 2017, NPR reported that DHS officials at a port in San Diego were telling asylees

from Central America "they can't come in." In June 2018, the *Atlantic* published video of asylum seekers being turned back at ports of entry—one man was turned back 20 times in four days. This forced them to sleep homeless under a bridge in Mexico. The same month, the *Intercept* reported on the officials in Texas rejecting asylum seekers from Central America, producing video of the illegal actions, and the *Washington Post* reported on a father with a 15-year-old son whom CBP officials had rejected *nine* times over the course of *nine* days. Here are many other cases.

In April 2018, Secretary Nielsen herself admitted this was happening and said, "We are metering, which means that if we don't have the resources to let them in on a particular day, they are going to have to come back." It is illegal under 8 U.S.C. 1158 to refuse to allow a person to submit an asylum application. It takes minimal resources to process an asylum claim, so the idea that they need to stop processing now is baseless. Moreover, because the practice has forced homeless, hungry, and desperate people to cross between the ports, DHS still has to process the claims, while at the same time, it has chosen to expend resources to arrest them, refer them for criminal prosecution, and house the children in detention facilities—all of which is more expensive than processing the original claim.

Finally, DHS is still separating some families who presented themselves at ports of entry for asylum. Secretary Nielsen has stated that "for those seeking asylum at ports of entry... we only separate if the child is in danger, there is no custodial relationship between 'family' members, or if the adult has broken the law." The ACLU filed a lawsuit on behalf of a woman who DHS separated from her 7-year-old daughter after she turned herself in at a port of entry. DHS eventually returned the child five months later without an apology. In December 2017, DHS separated four fathers from their children, claiming that it couldn't verify their relationships. Many other cases have been documented by Erika Pinheiro, policy and litigation director at Al Otro Lado. The separation policy is far broader than DHS maintains.

3. "If you as a parent break into a house, you will be incarcerated by police and thereby separated from your family. We're doing the same thing at the border." -DHS Secretary Kirstjen Nielsen

- *No, it's not the same. Burglary is a serious crime and generally a felony. Illegal entry is not.*

Ignoring the illegality of prosecuting asylum seekers and setting aside the fact that there is no requirement to prosecute, illegal entry is a misdemeanor offense. Illegal entry is most similar to technical violations of motor vehicle law, such as driving without a license, not breaking and entering, because it amounts to nothing more than movement without a proper permit. Many misdemeanors do not even require police to take a person into custody at all. A variety of traffic offenses—including driving without a license, operating an unregistered vehicle, speeding, and other offenses—are misdemeanors in dozens of states. In general, police simply issue a summons to appear in court (for an example, see the Virginia code here). If a child is in the vehicle, they are not separated from the parent pending the final dispensation of the case.

In the unusual cases in which a parent is brought into custody for such a violation, the children either wait in the police station while the parent is processed or are handed off to a relative. For example, in the case of ***Gail Atwater v. City of Lago Vista***, a local police officer arrested Atwater for a seatbelt violation with children in the car. The officer initially said that the children could come to the police station, but allowed a friend of Atwater to pick them up. In other words, there is a massive difference between the treatment of minor offenses committed by Americans and these parents coming to the border. Moreover, if U.S. parents and children are separated for these types of offenses—as in the Atwater case—it is an outrage, not a justification for further separations.

4. "The separation of parents and their children is because of a court ruling." –Speaker Paul Ryan

- *No, it only requires the government to treat children humanely.*

No court case requires the separation of parents and children. Defenders of the Trump policy point to the *Flores* settlement agreement and the Ninth Circuit's 2016 interpretation of it, but neither requires family separation.

In 1985, Border Patrol arrested a 15-year-old Salvadoran girl named Jenny Lisette Flores attempting to cross the border illegally. She was attempting to reunite with her mother who had come to the United States during El Salvador's long and bloody civil war. She—and all other minors in government custody—were subject to abuse, detained alongside adults, and forced to undergo daily strip searches, which a judge found violated the Constitution in 1988. After more than a decade of litigation over her case, the Clinton administration settled, entering into an agreement that specified standards for facilities for minors and required the government to quickly place minors in "the least restrictive setting appropriate to the minor's age and special needs." The Ninth Circuit in 2016 found that it "unambiguously applies both to minors who are accompanied and unaccompanied by their parents."

Nothing in the ***Flores*** settlement or the Ninth Circuit decision mandates that children be separated from their parents—just the opposite: *Flores* requires that they be reunited with them if they happen into government custody alone. Minors are only to be separated from "unrelated adults." The Trump administration argues that because *Flores* mandates the release of children within 20 days, it requires them to separate children from their parents who are still in custody. This is false. *Flores* does not prohibit the release of parents, which would keep the family unit together as long as their case is pending (argument #5 below shows how this can be workable).

In any case, *Flores* was not the origin of the family separation policy because it only governs DHS custody determinations. The separation of children and parents started up in earnest this year because DHS decided to transfer to DOJ—and DOJ decided to prosecute—parents who had crossed the border with children.

5. "Adults and children were simply being released in the country [when] we refused to prosecute these adults for illegal entry." -Attorney General Jeff Sessions

- *Prosecution doesn't prevent eventual release, and alternatives to detention work and save money.*

Prosecutions for illegal entry do not prevent release into the United States. After the 9th Circuit clarified that *Flores* applied to all minors, the Obama administration did decide to release both parents and children pending determinations on their asylum claims, rather than separate the children from the parents. But prosecutions for illegal entry only delay deportation for those without a credible asylum claim and do not prevent release of asylum seekers by the DHS after DOJ is finished prosecuting them. In fact, the criminal prosecutions often only take a few days to process because defendants are prosecuted in mass, and most plead guilty as quickly as possible (particularly when they are separated from their children). After the prosecution, the parents are sent back to DHS custody—just not with their kids.

While families were released in 2015 and 2016, the Obama administration created alternatives to detention that included bonds, electronic monitoring, and community management. These programs resulted in high levels of compliance among asylum seekers pursuing their claims in immigration court. In 2016, 83 percent of those released on bonds showed up in court. The Intensive Supervision Appearance Program (ISAP) resulted in appearance rates of 99.6 percent. The Family Case Management Program (FCMP) uses caseworkers to help immigrants comply, and 100 percent of the immigrants in the program showed up for their court hearings. Nonetheless, the Trump administration terminated this program in June 2017. The Family Placement Alternatives program which relies on community monitoring achieved a 97 percent appearance rate, at a cost of just $50 per day per family, compared to the estimated detention cost of $798 per family. In other words, there are cheaper alternatives to detention.

6. "It would be a tough deterrent." -White House Chief of Staff John Kelly

- *Family separation has failed to deter people from coming, and it is cruel and illegal to deter asylum seekers from seeking safety in the United States.*

No evidence has emerged that family separation has done much to deter illegal immigration. DHS experimented with family separation in a single border sector around El Paso from July to November 2017. As Dara Lind at Vox first reported, the number of families coming through that sector actually increased 64 percent during the experiment from 231 to 379. May was the first month that saw the policy applied across the entire border, and the number of families stayed virtually the same from April through the end of May. In general, the number of families has increased from a monthly average of 6,301 in 2017 to 7,389 in 2018, despite increasingly harsh enforcement.

In any case, it is entirely legal to seek asylum at or between ports of entry, and prosecuting asylum seekers in order to deter them from fleeing violence is illegal and cruel. Kelly has said that he wants to deter them because the journey is so dangerous. But the migrants are aware of the risks. A UNICEF report from 2016 highlights stories of Central Americans who are planning to travel or have attempted to travel to the United States, including a boy who lost his leg falling from a train on the way. Still, he predicts that his siblings will eventually make their own attempts to get to the United States. As UNICEF concludes, "Anyone who fled from a gang or other criminal organizations is at high risk of being attacked, raped or killed upon returning home." Dozens of deported Central Americans, including some children, have already been murdered. The repeated attempts of people who were deported further highlights that they consider the dangerous journey a risk worth taking.

7. "The kids are being used as pawns by the smugglers and the traffickers." -DHS Sec. Kirstjen Nielsen

- *False. DHS statistics show that 99.8 percent of all families were not alleged smugglers.*

DHS alleges that 237 individuals of the 106,724 who entered as a family unit from October 2016 to February 2018 pretended to be the parent of a unrelated child—that is 0.2 percent of all family members. It is important to remember that this is just what DHS alleges, not what it has proven in court. Some of these parents dispute DHS's findings, claiming that they are the parents of the children, and have now been wrongfully separated from them.

8. "Our issue is strong borders, no crime; their issue is open borders, let MS-13 all over our country." -President Trump

- *False. Latin American immigrants, including illegal immigrants, are less likely to commit crimes.*

In 2016, immigrants from Latin America were about half as likely to end up committing crimes and being incarcerated in the United States as native-born Americans. Even illegal immigrants from Latin America—who can be incarcerated in detention and prisons purely for immigration offenses (as the administration is doing)—are significantly less likely to be incarcerated in the United States than people born in the United States. A substantial body of research now shows that immigration has reduced crime rates in general across the United States.

9. "Such a difference in the media coverage of the same immigration policies between the Obama Administration and ours." – President Trump

- *Obama's flawed policies don't justify Trump's, and while Obama did occasionally separate some families, Trump not only increased the practice dramatically—he made it mandatory.*

President Obama never had an explicit policy of separating families. Nonetheless, the Obama administration's activities should not be downplayed. Virtually all the actions that the Trump administration has taken are ramped up versions of policies and practices of the prior administration. American Immigration Council filed a complaint on behalf of five asylum seekers denied access to ports of entry in early January 2017 before President Trump took office and called the practice "systematic." Lutheran Immigration and Refugee Service, Women's Refugee Commission, and Kids in Need of Defense published a report the same month describing numerous reports of family separation as a consequence of criminal prosecutions.

But DHS turned the problematic procedures under the Obama administration into official policy—indeed, appearing to even intentionally target parents with children as a deterrent. Under Obama, DOJ's policy was generally not to prosecute parents traveling with children (though it is clear that DHS did not always refrain from referring parents to DOJ for criminal prosecution). In any case, under Trump, the share of border crossers that were prosecuted shot up from 30 percent to 60 percent (not quite "zero tolerance," but moving in that direction). DHS has not published statistics on the number of separated families over time, but in May through June 2018, the policy separated between 2,300 and 3,000 children from their parents. The number of cases before the policy is unknown, but likely in the dozens per month or fewer.

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Legal Considerations for Separating Families at the Border

By Carrie Cordero Tuesday, June 19, 2018, 11:50 AM

Reports spilling out of detention centers and immigration proceedings in McAllen, Tex. and elsewhere along the southern border include new details about the measures government officials are taking to separate children from their parents. The families are being separated while in government custody as a result of the agreement by the Departments of Justice and Homeland Security to achieve a goal of 100 percent prosecution for cases of illegal entry into the United States.

Last week, I shared some thoughts—based on my experience working on sensitive counterterrorism cases at the Justice Department in the post-9/11 era—regarding the ethical dilemma that federal agents, lawyers and other professionals face each day they are directed to implement the new policy of separating children from their parents. This post raises issues regarding the rights of the affected children and potential legal exposure faced by the workforce implementing this policy. None of the legal issues discussed below should be read in isolation; the ethical arguments for immediately ceasing this practice remain.

After Homeland Security Secretary Kirstjen Nielsen returned from her working and sightseeing trip to Israel, she tweeted this on Sunday:

> **Secretary Kirstjen M. Nielsen** @SecNielsen · Jun 17, 2018
> This misreporting by Members, press & advocacy groups must stop. It is irresponsible and unproductive. As I have said many times before, if you are seeking asylum for your family, there is no reason to break the law and illegally cross between ports of entry.
>
> **Secretary Kirstjen M. Nielsen**
> @SecNielsen
>
> We do not have a policy of separating families at the border. Period.
>
> 5:52 PM · Jun 17, 2018
>
> 7.3K 60K people are Tweeting about this

For purposes of this post, let's take Nielsen at her word and interpret her tweet—and her statements Monday at the White House podium—to mean that there is no written policy issued by DHS detailing the program of family separation and providing guidance to the workforce for how to implement it. While DHS issued a myth vs. fact document on Monday intended to correct what Nielsen alleges is misreporting, this is a public relations document, not a policy.

If this analysis is correct—that DHS does not have a written policy authorizing the separation of family members in the course of referring migrants for prosecution—it goes a long way toward explaining the chaos at the border in the past month. An interpretation along these lines both recognizes the semantic game the secretary is playing ("there is no policy") with the apparent practical reality that DHS has not produced a policy document explaining how the goal of 100 percent prosecution should be met or how agents should implement it. That lack of policy guidance—in addition to the secretary's statement that a policy does not even exist—should give government agents working on the border, as well as their unions, pause.

As I noted in my prior post, three agencies are involved in implementing the family-separation policy: the Justice Department, DHS, and the Department of Health and Human Services (HHS). The Justice Department is involved because the separations appear to take place in the course of implementing the attorney general's policy of prosecuting all illegal-entry cases. U.S. attorneys in each respective federal district are responsible for carrying out this new prosecutive guideline. DHS is involved because it is the home agency for Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), the agencies involved in apprehending migrants and adjudicating their immigration status, respectively. Once children are separated from the parent who is being prosecuted, they are apparently transferred to HHS, which administers the program for temporary shelter and foster care.

Most of the examples of alleged harsh treatment of detained migrants and their children appear to involve interaction with DHS agents or officials, or possibly HHS officials or contractors. These include stories of a child being forcibly separated from a parent and relocated to a foster family; a report of a mother separated from her child while breastfeeding (which CBP denies); and reports of children left alone in a federal housing facility and despondent for lack of a parent or familiar caregiver. At least one worker at a detention center for children quit over the conditions.

Based on the information publicly available so far, and given the lack of written guidance for agents on the front lines to follow, agents separating families in order to achieve the goal of 100 percent prosecution may be operating in a legal gray zone. As far as can be discerned from public reports, Attorney General Jeff Sessions and the homeland security secretary have not provided the workforce with official guidance explaining the legal basis on which they are removing children from their parents for sustained periods of time. While attention has been given to how parents can locate their children, the equally if not more compelling argument against the policy is the right of the child to be reunited with the parent.

The executive has strong legal authorities at the border to regulate who may enter the country. But once allowed entry into the United States, migrant children have rights under the Constitution. Public reporting indicates that children are being detained for in-processing; held in confinement for days, weeks or months; and relocated to foster care—all the while unaware of when or if they will be reunited with a parent. It is not known whether the Justice Department's Office of Legal Counsel has issued an opinion outlining the parameters of when children may be separated from their parents. So the first issue is whether there actually is a constitutional theory for lawfully detaining these children for sustained periods.

Generally, in a law enforcement context, families are separated when an adult is arrested or convicted of a crime, if the penalties involve jail time. (With the revocation of Paul Manafort's bond on Friday, the country has also re-familiarized itself this week with pre-trial detention.) But in these circumstances, due process has been provided: a complaint has been filed, a grand jury has indicted, or a judge has issued a warrant or heard evidence supporting the argument for detention. Moreover, when a parent is arrested for a crime, the government does not place the child in a government facility or in foster care unless the child has no other parent or family member, or is in danger, or removal is otherwise deemed to be in the child's best interests. The key determining factor is that the treatment should be in the best interests of the child.

Greater attention should be given to whether there are even any legitimate constitutional grounds for removing a child from a parent—for days to weeks to months without end—in the context of enforcing a misdemeanor illegal-entry law. On even less firm ground is the ability of the government to place a child in foster care absent a best-interest-of-the-child analysis, which is most appropriately conducted by a neutral magistrate. And, to be clear, there is no statutory requirement to separate children from their parents. The separations are flowing directly from the policy decision of the Trump administration to refer additional illegal-entry cases for prosecution without adequately developing a sufficient legal framework and an accompanying policy for addressing the practical realities of what would happen to the children as a result of the new prosecutive guideline.

A second issue is whether, in the course of carrying out what agents believe is a lawful implementation of the immigration laws, the civil rights of the adult or the child may be violated. With respect to children in particular, this could include separating a young child from a mother or parent, thereby causing mental trauma; placing a young child in the care of strangers or government officials against the child's will or best interests; or more commonly recognized forms of physical abuse that could occur while the child is in the custody of non-parents.

The risk of civil rights violations—particularly in the absence of policy guidance to the agents, officers and other government officials involved in the separation and supervision of these children—raises the possibility of potential color-of-law violations. According to long-standing civil rights practice, the Justice Department investigates and prosecutes civil rights violations that take place "under color of law."

Section 242 of Title 18 of the U.S. Code provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnaping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Known as deprivation of rights under color of law, this section usually deals with cases in which a suspect or other person involved in an altercation with law enforcement is injured or shot in an aggressive police action. Think of a police shooting of an African American man who ran away after being stopped for a broken tail light. Color-of-law cases investigated by the FBI and prosecuted by the Justice Department usually involve an act of violence: an assault resulting in death; a shooting; a beating. The cases that are generally brought for prosecution involve excessive use of force, which aggravating circumstances raise the charge to a felony. However, the statute provides for misdemeanor violations as well.

The current border situation seems ripe for potential violations, particularly if the agents are not receiving guidance about the appropriate length of detention, ages of children that may be separated, or the combined detention of young children and teenagers. This is not at all to suggest that border patrol agents, or government or contract workers in HHS-supervised facilities are ill-intentioned or lawless. On the contrary, my concern stems from the lack of policy, guidance and oversight they appear to have been given in carrying out a very difficult job.

Although the color-of-law statute is not, as far as I know, regularly applied beyond the context of use of inappropriate force, there may be room for it to be interpreted more broadly if it is determined that ancillary laws are being broken in the course of implementing the non-policy separation policy. For example, the president of the American Academy of Pediatrics, Colleen Kraft, issued a statement that reads in part:

Separating children from their parents contradicts everything we stand for as pediatricians — protecting and promoting children's health. We know that family separation causes irreparable harm to children. This type of highly stressful experience can disrupt the building of children's brain architecture. Prolonged exposure to serious stress — known as toxic stress — can lead to lifelong health consequences.

Kraft has described what the children are experiencing as "toxic stress," which can have long-term developmental consequences for the child. She went further in television interviews, saying that the circumstances of the children's detention could amount to child abuse.

All 50 states have statutes criminalizing child abuse; in Texas, where many of these children are being held, state law prohibits inflicting or failing to reasonably prevent "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." As a result, there may be a legal theory available that color-of-law violations could be brought based on the current activity, under the reasoning that child abuse is being committed "under color of" enforcing the immigration laws. This potential color-of-law exposure would be an expansion of how this provision has been used in the past. But separating a young child from a parent in a strange country, alone in government detention, with no information about when the child will ever see her parent or family again, is a severe penalty that may cause lasting physiological and/or psychological damage. And the government seems to be inflicting this not merely as an accidental byproduct of law enforcement but, instead, for the purpose of deterring migrant populations from seeking entry into the United States—or, in the most craven interpretation, to achieve a legislative goal.

A third legal issue, which I will touch on only briefly, involves the potential human rights implications of the practice. The United States has not ratified but is a signatory to the United Nations Convention on the Rights of Children. Article 9 of the convention contains provisions requiring judicial review of separation of children and parents and a best-interest-of-the-child analysis. As a signatory, the United States is not bound specifically by the treaty but does have obligations not to subvert it. I note this treaty here to highlight that a more considered analysis of whether this policy comports with existing legal frameworks would also take into account obligations under international law.

***

The chaos at the border over the last month reminds me of the implementation of the first travel ban in the early weeks of the Trump presidency. The travel ban was a campaign promise transformed into a sloppily drafted executive order from the White House, the implementation of which caused chaos at the borders. The initial document failed to adequately consider, for example, the rights of permanent resident aliens. The policy was implemented without appropriate interagency coordination. The initial days of the ban, until the courts intervened, unnecessarily affected individuals trying to enter this country.

But this is worse. The Cabinet secretary whose agents are implementing the policy denies its existence, even though we can see with our own eyes and hear with our own ears that it does. The individuals affected by this new policy are inside the United States, which means they unambiguously have constitutional rights. And the government has implemented the policy without adequately and humanely addressing the rights and needs of children—who cannot advocate for themselves—not to be detained, placed in custody without a parent, or sent to foster care without an understanding of when they will be relocated with their families.

What's more, the travel ban was easily challenged in court. And as a result of the sloppiness, federal judges ruled against the ban aggressively. In this case, the lack of a written executive order or agency directive will make challenging the practice at a systematic level more difficult—despite the fact that the policy raises serious legal, not to mention moral, questions.

Topics: Homeland Security, Border Security, Immigration

Carrie Cordero is a Senior Fellow at the Center for a New American Security. She is also an adjunct professor at Georgetown Law, where she previously served as Director of National Security Studies. She spent the first part of her career in public service, including as Counsel to the Assistant Attorney General for National Security; Senior Associate General Counsel at the Office of the Director of National Intelligence; Attorney Advisor at the Department of Justice, where she practiced before the Foreign Intelligence Surveillance Court; and Special Assistant United States Attorney.

@carriecordero

In support of a travel ban

People tell CNN why they agree with the President's executive order

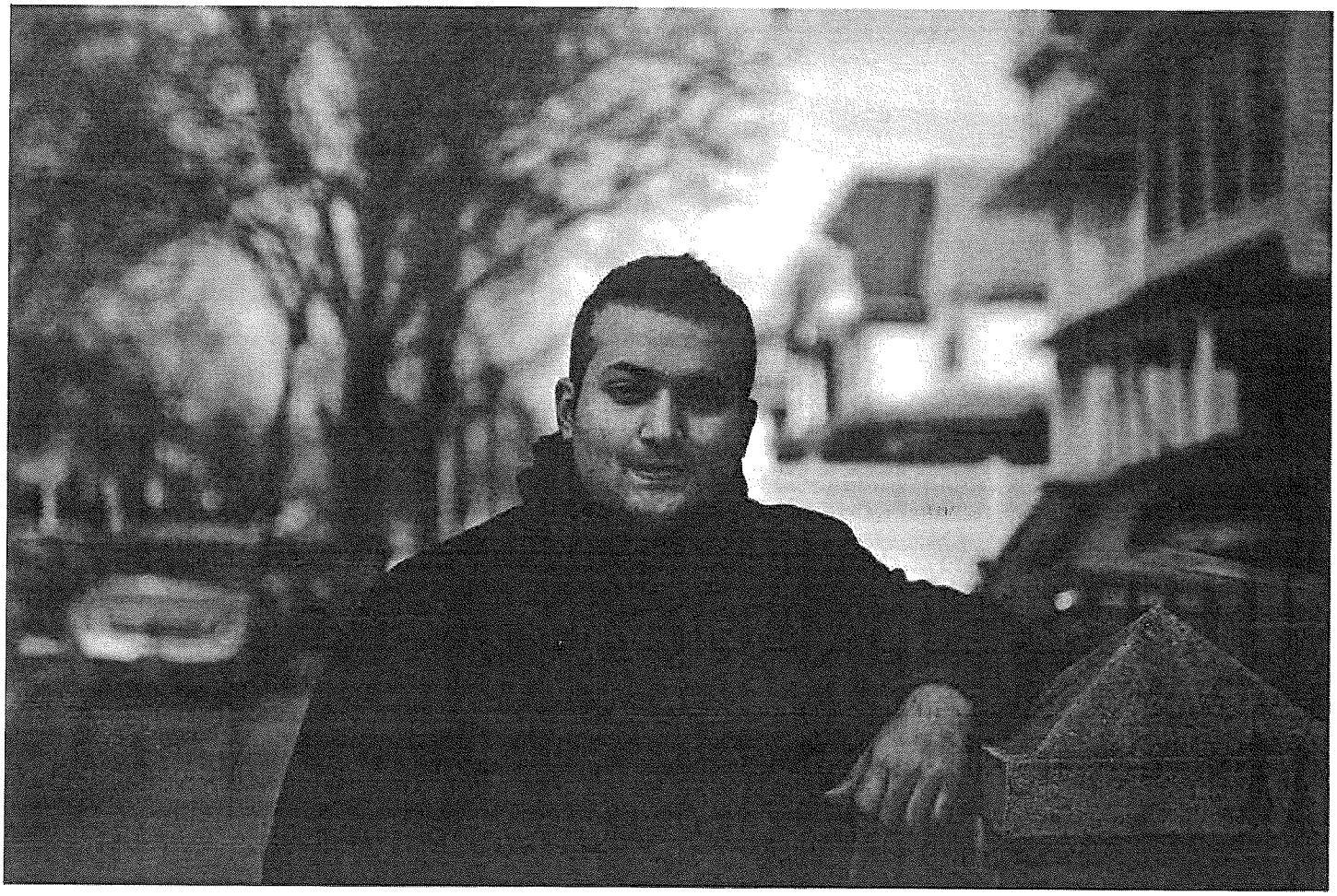
Story by Lyric Lewin, CNN

The travel ban ordered by President Donald Trump has received fierce criticism and legal challenges.

But there are many Americans who agree with Trump that temporarily banning refugees -- as well as immigration from certain countries -- is necessary to ensure safety in the United States.

Here are a few people who spoke with CNN about why they support the administration's stance. In all the conversations, everyone expressed concern for those fleeing persecution and war but emphasized the desire for the United States to protect its borders.

Also see faces of those impacted by the travel ban



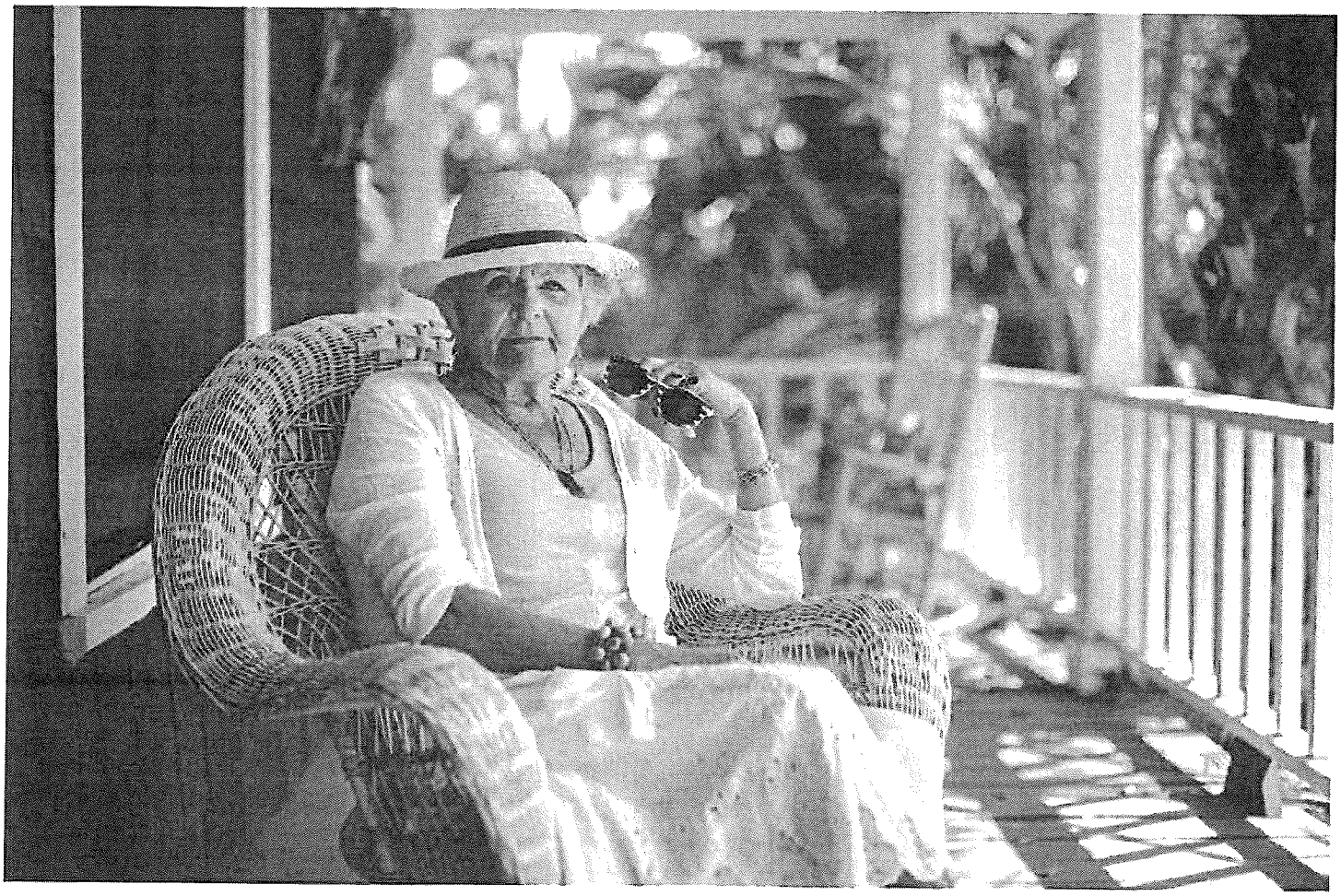
Mark Kauzlarich for CNN

Danny Eapen
25, New York

Danny Eapen, the son of Indian parents, was born and raised in Qatar, and he said he is used to being "extremely screened" when he travels back home to visit his family over the holidays. He doesn't mind it though. His positive attitude permeated his voice as he explained that, "When I was flying from Tulsa, Oklahoma, to Doha, Qatar, I was extremely screened by immigration because they wanted to know why a guy with an Indian passport born and raised in the Middle East is flying back to Doha. That was under (the) Obama administration. So when it happened, I wasn't mad at them or upset because I know as soon as I touch back in Doha they're going to do the exact same thing or even worse." He said in Qatar, "if

someone is flying from Jordan into Doha and they see there is a stamp on their passport that they were in Iraq, the airport security would question them. ... People in the Middle East get screened by others in the Middle East."

Even though Eapen couldn't vote, he campaigned for Trump and said he doesn't see the ban as a Muslim ban because so many Muslim-majority countries, such as Indonesia, were left off the list. He saw it as more of an effort to target certain problematic hot spots in the world.



Matthew Coughlin for CNN

Susan Richardson
71, Florida

Susan Richardson is an immigrant from England. She came to the United States in 1965 and considers it an enormous honor. She supports the travel ban because she believes that any sovereign country has the absolute right to protect its borders.

"I'm a legal immigrant," said Richardson, an oil painter and artist who's been an entrepreneur for years. "When I came to this country, if you didn't have the right visa, if you didn't have somebody who sponsored you, you were turned back at the airport."

She said there should be a firm vetting process but believes allowances should be made for women, children and the elderly who are fleeing war-torn areas. She thinks that single, military-aged men should be back home aiding the war efforts.

"We (Americans) are very generous people. I'm from England and Brits are generous people, too. ... I'm not anti-Muslim, I'm anti-violence."

Brinson+Banks for CNN

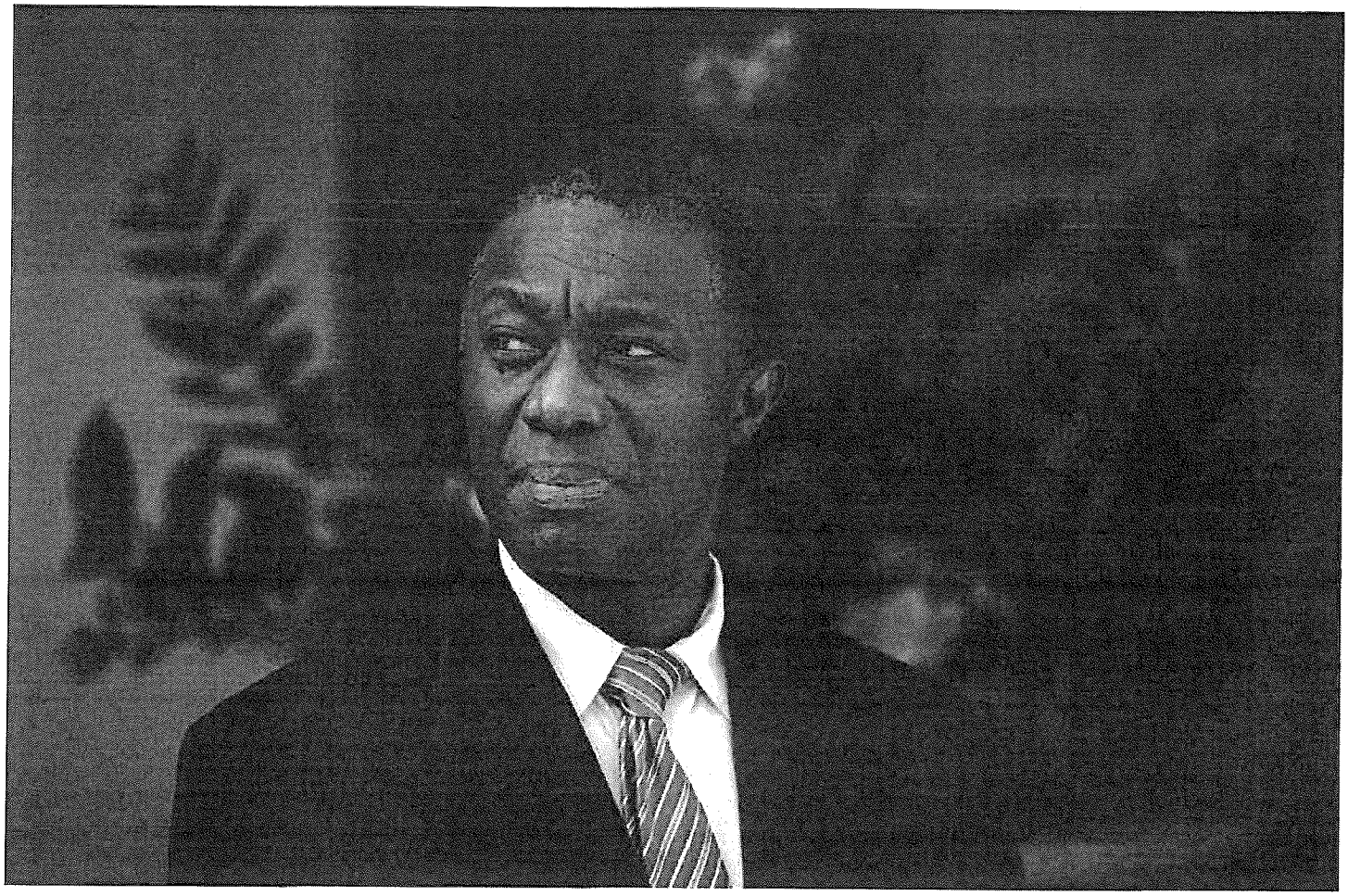
Rebecca Meyer
39, California

Rebecca Meyer is a schoolteacher in southern California who spoke with CNN last month about Trump's first travel ban, which was blocked by a federal judge. She said that while she supported Trump's decision to pause travel from certain countries, she had some criticism for the way he went about it. After Trump's latest executive order, she thinks the ban is less restrictive and that's a good thing.

"I think any good leader who comes into a position and they feel like they need to take a timeout or a pause in order to re-evaluate -- that's good

leadership," she said. "You take a minute to look at a policy. And yes, it's going to be inconvenient to some, but in the grand scheme of things, it takes time to evaluate things that have to do with national security and safety."

Meyer said this new order seems like Trump is being a little more flexible and maybe listening to some of the dissenters and fixing some things they wanted to see changed: "Sounds like maybe he's making some changes in order to strengthen the relationship we have with Iraq and defeating ISIS." Meyer spoke carefully of the situation, knowing it's complex, and she said, "I always try to put myself in the shoes of those who disagree."



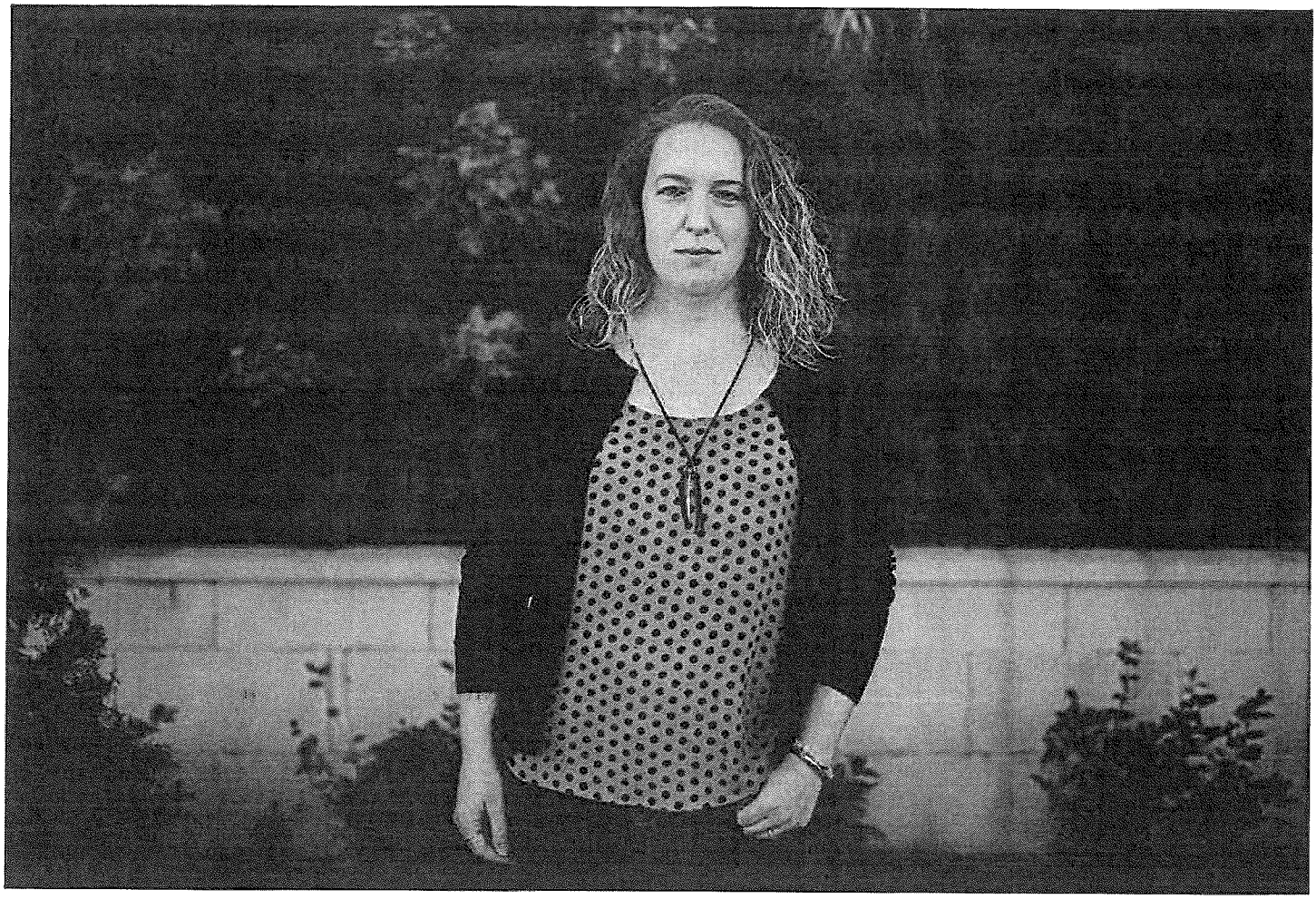
Dustin Chambers for CNN

Eric Johnson
53, Georgia

Eric Johnson voted for Trump because national security was a priority to him, but he suggested that Trump could do a better job with how he implemented and communicated the first ban. "I agree with his objective, I most likely agree with his decision, but I think he's got to do a better job on how he presents it to the American people," Johnson said.

"America, we are a country that has open arms to people. We are compassionate. ... We also have to realize our objective for those people who are doing the right thing, we want to be sensitive to them because we don't want to send a message to people who are the good ones that you're not welcome in America. If those (executive order) changes are improving that area of compassion for law-abiding people coming here, that's a good measure."

Johnson suggested that Trump could support more programs, nonprofits and churches who are working on supporting and aiding refugees. "Let's work with the Red Cross and other international organizations. Help those people who feel they're suffering as a result of ISIS and in Syria and let's try to support them. Let's not do anything to jeopardize our security, because if we are not safe then we can't help them."



Melissa Golden/Redux for CNN

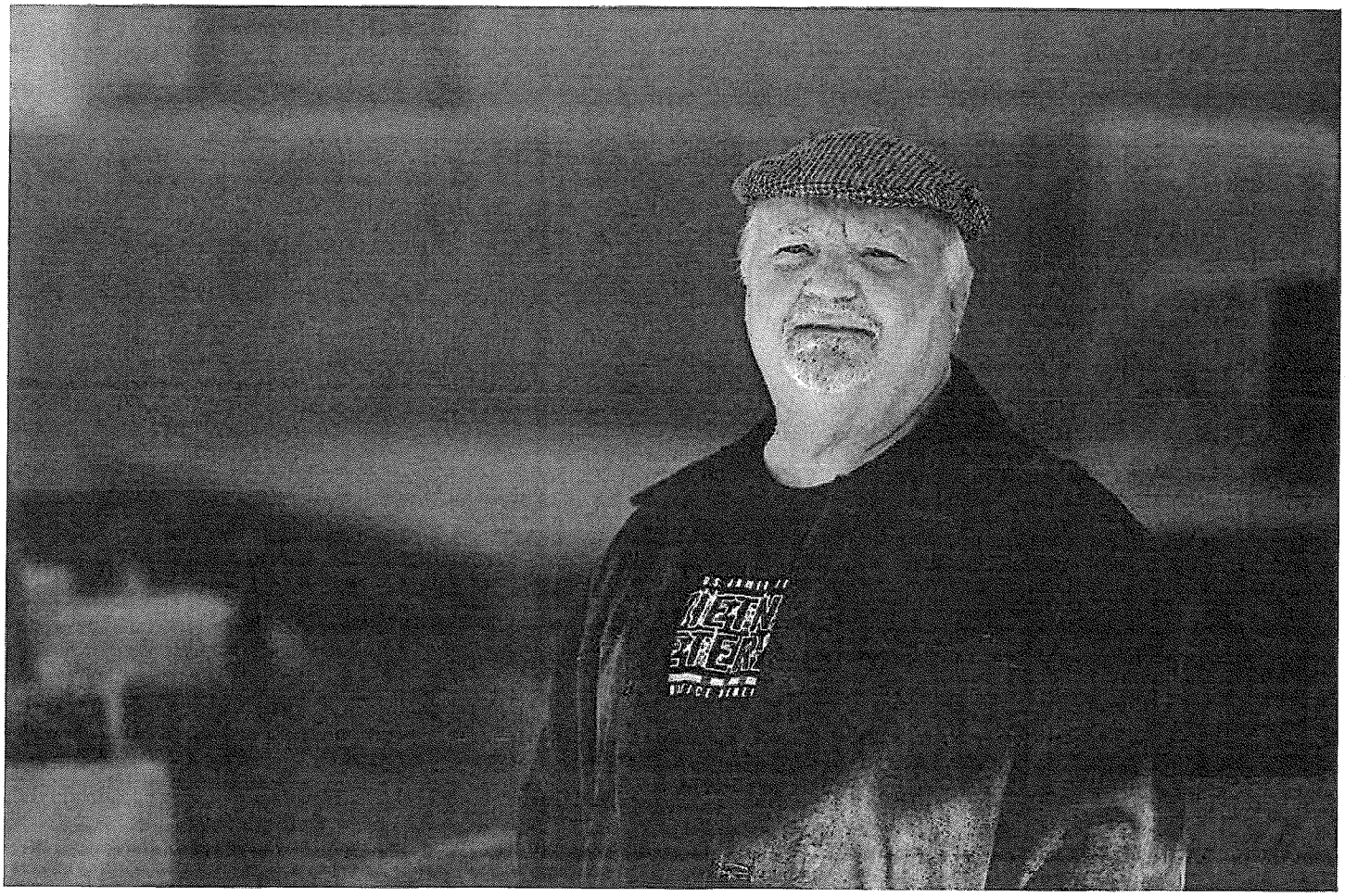
Amanda Patrick
38, Georgia

Amanda Patrick is a tax associate with a 5-year-old son. She said she's not opposed to immigrants coming into the country through the proper steps and vetting processes, but she said "the biggest thing for me, especially with having a child now, is the safety factor. Just people coming in that we aren't properly vetting."

Regarding refugees, she said: "I don't have issue with the people who have been properly vetted. I think (Trump's first executive order) probably came down a little too quickly, perhaps a little too harshly, especially with people caught mid-travel. Let them make it through the airport, let us do the vetting

on our end, and put them in a safe place if they were truly coming through on those proper channels."

She believes it's a good thing the executive order was re-written. She said it seems like Trump had more input from advisers and had put more thought into it, which she hopes will alleviate some of the tension overall.



Isaac Brekken for CNN

Robert Reed
71, Nevada

Robert Reed was 19 when he came to the United States from England, full of hope for the future. A few months after arriving on American soil, he was

drafted to go fight in Vietnam. "I served in Vietnam, honorably, (for 13 months) and I'm very proud of that," he said.

He felt apprehensive and a little scared after being drafted, but he stated that he wasn't at all resentful. "I was proud to be here," he said. "I felt by serving, in some ways, would be advantageous for my future. I feel resentful of people who didn't serve and found a way out and dodged the draft. When I came back, we didn't talk about it – we were verbally attacked in some cases that we were even there because it was a very unpopular war. I felt very proud that I served.

"Which is another reason why I feel that, having served the United States proudly, I earned something, the right to be here. People coming here illegally have earned no right whatsoever."

Reed is now retired after being self-employed. He voted for Trump in November -- not because he necessarily liked Trump, he said, but because he did not trust the Clintons.

Melissa Golden/Redux for CNN

Betty Norris
49, Alabama

Betty Norris, a manager at Highway Pickers Antique Mall & Market, said she supports the travel ban even though she thinks Trump's first one was done hastily. She supports people coming to this country legally, getting jobs and paying taxes.

"If you're going to be here, you need to do what we are required by law to do," she said. "You shouldn't have more privileges or less privileges if you do what I do, my neighbor does: pay your taxes, pay your bills and work."

Regarding refugees, she said: "I think it's a horrible situation, I think it's a dire situation, and as a mom, my heart goes out to those children, it hurts

my heart.

"Every country, I think, needs to put money in the pot for this fund. ... Those countries that people are leaving from? They have some responsibility to their own people. ... Why are they not taking care of their own people? I think that needs to start there."

COMMENTARY Immigration

Why Does the "Open Borders" Lobby Oppose Trump's Rule Against Asylum for Abusers, Gang Members, and Violent Criminals?

Oct 30th, 2020 4 min read

Commentary By
Mike Howell
Senior Advisor, Executive Branch Relations
Hans A. von Spakovsky
Election Law Reform Initiative and Senior Legal Fellow

KEY TAKEAWAYS

Illegal immigrants often falsely claim eligibility for asylum as a tactic to extend their stay in the country.

It doesn't require a foreign court conviction for wife-beating to make an applicant ineligible for asylum.

Abusers, gang members, and other criminals do not deserve asylum.

On Oct. 21, the Departments of Justice and Homeland Security finalized a new rule that will prevent gang-bangers, violent felons, domestic batterers, and dangerous drunk drivers from being granted asylum. You'd think that every American would agree that our country doesn't need more criminals, nor should they be allowed to take advantage of the asylum process.

Yet don't be surprised if the "open borders" lobby challenges the rule on meritless grounds, hoping some activist judge will toss it out. After all, that's how they've tried to overturn almost every major immigration action taken by this administration.

Under the asylum process, both legal and illegal aliens can find refuge in the United States by establishing that a return to the home country would be too dangerous due to "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

particular social group, or political opinion." The granting of asylum is discretionary; even if an alien technically meets these requirements, he can still be denied asylum if the individual facts don't merit granting asylum.

The asylum process has become a major loophole in the immigration system. Recognizing that the immigration courts are overburdened and an asylum claim triggers a lengthy legal process, illegal immigrants often falsely claim eligibility for asylum as a tactic to extend their stay in the country. From 2008 to 2017, asylum claims exploded by almost 1,700%. Ultimately, about 90% of these claims were rejected as invalid or fraudulent.

Gang members certainly don't merit discretionary asylum. Criminal transnational gangs continue to take advantage of our immigration system to smuggle drugs and people into the country, engaging in human trafficking, sex slavery, and committing violent crimes. They earn tens of billions of dollars through these operations.

In July, the administration announced the results of a joint Department of Justice-Department of Homeland Security task force that charged 13 leaders of the violent MS-13 gang, which was transporting bulk quantities of methamphetamine and weapons into the country.

According to Nicholas Trutanich, U.S. attorney for the District of Nevada, the arrests "disrupted MS-13's leadership and significantly undermines the gang's ability to engage in violence and other criminal conduct." This major investigation is only one example of the administration's focus on MS-13 and other transnational gangs.

It's not just gang members whom the new rule would exclude from receiving asylum. Child abusers, wife beaters, drunk drivers, and felons who have committed crimes under federal, state, or tribal law would be excluded as well, and for good reason. The asylum process was intended to protect those who are threatened with prosecution not because of their own violent criminal or reckless behavior but because of things they cannot change, such as their race or nationality, or should not have to change, such as their religious beliefs, political opinions, or membership in a particular social group. It makes no sense to extend this definition to include criminals and others who pose a threat to public safety.

Those who are aware of the shortcomings of foreign legal systems, particularly when it comes to protecting women and children from domestic abuse, should be pleased to know that the new rule takes that problem into account. For example, it doesn't require a foreign court conviction for wife-beating to make an applicant ineligible for asylum. Instead, if "there are

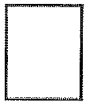
serious reasons to believe" that the alien has "engaged in acts of battery or extreme cruelty," that can be considered by immigration officers in evaluating the asylum claim.

All of this, no doubt, seems like common sense to the vast majority of Americans who welcome legal immigrants and support our asylum laws. Many will be surprised to learn that these criminals were eligible for asylum in the first place. They may also be surprised to learn that some on the Left are already planning legal challenges to the rule.

Yet, as Deputy Secretary of Homeland Security Ken Cuccinelli told the Daily Caller, "This is part of President Trump's four-year effort to bring some sanity to the asylum system and our legal immigration system in particular." It is intended "to get the charlatans out of the system and preserve it for those who are deserving of America's tremendous generosity."

We wholeheartedly agree. Abusers, gang members, and other criminals do not deserve asylum.

This piece originally appeared in the Washington Examiner



COMMENTARY Courts

It's Time to End DACA – It's Unconstitutional Unless Approved by Congress

Jan 25th, 2019 5 min read

Hans A. von Spakovsky
@HvonSpakovsky
Election Law Reform Initiative and Senior Legal Fellow

Hans von Spakovsky is an authority on a wide range of issues—including civil rights, civil justice, the First Amendment, immigration.

KEY TAKEAWAYS

Importantly, the high court didn't reject the request filed by the Justice Department to allow President Trump to end DACA. The request is still pending.

The issue at stake is what power the Constitution gives the president to act alone by issuing executive orders, without seeking approval from Congress.

According to the most recent figures only 49 percent of DACA beneficiaries have attained a high school education – despite a majority of them now being adults.

It's disappointing that the Supreme Court failed Tuesday to grant the Trump administration's appeal of a lower court order that prevents the president from ending the Deferred Action for Childhood Arrivals (DACA) program. But it's not the end of the story.

Importantly, the high court didn't reject the request filed by the Justice Department to allow President Trump to end DACA. The request is still pending.

If the Supreme Court grants the Justice Department's appeal of the lower court order between now and the end of June, the case to determine the fate of the DACA program will be heard during the next term of the court that begins in October.

Roughly 700,000 immigrants brought to the U.S. illegally as children are protected from deportation by DACA. The argument in favor of the program is that the children didn't

choose to break the law and so should not be punished because their parents violated immigration laws by bringing them to the U.S.

But the central issue at stake in the DACA case is not whether the young people now protected by DACA deserve or don't deserve to be allowed to stay in the U.S. The issue at stake is what power the Constitution gives the president to act alone by issuing executive orders, without seeking approval from Congress.

The framers of the Constitution very deliberately set up a system of government where power was divided between the president and Congress, with the courts given the power to rule on disputes. These checks and balances were created to prevent one person from ruling the country as an all-powerful king or dictator. The system has worked brilliantly.

To preserve that system of checks and balances, the Supreme Court should hear the appeal of the lower court case on DACA and give President Trump the authority to end the program.

No matter what view you may have about whether the DACA program is good public policy, the decision to extend amnesty and government benefits to illegal immigrants is a decision that under the Constitution can only be made by Congress – not the president.

President Trump announced Saturday that he would support legislation in Congress to extend DACA protections for three years for the 700,000 young people now in the program, and also support a three-year extension of another program that allows 300,000 immigrants from countries stricken by disasters or conflicts to stay in the U.S. But in return, the president said Congress would need to approve the $5.7 billion he has requested for a barrier along portions of our southern border.

Rather than agree to the president's compromise proposal that would give DACA the congressional approval it needs to pass constitutional muster for three more years, Democratic leaders in the House and Senate rejected the offer immediately because they refuse to fund the expansion of current border fencing.

DACA was created by an executive order issued by President Obama in 2012 without the approval of Congress – despite the fact that Article I, Section 8 of the Constitution assigns complete authority to Congress to determine our nation's immigration rules.

DACA provided a temporary promise that the government wouldn't deport immigrants who were younger than 16 when they were brought to the U.S. illegally. DACA also provided

these illegal immigrants with government benefits, such as work authorizations. And it allowed the president to defer deporting these illegal immigrants for years.

But providing administrative amnesty and access to government benefits is beyond a president's constitutional and statutory authority. This was the ruling of the 5th U.S. Circuit Court of Appeals when it upheld a court order against President Obama's attempt to expand DACA and implement another program with similar benefits in 2014, called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).

The appellate court said that federal immigration law "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorizations." A divided U.S. Supreme Court upheld this decision in 2016, leaving the court order against DAPA in place.

The Trump administration announced in 2017 that – given the Supreme Court's ruling in the DAPA case – it was going to wind DACA down, too, since the same arguments accepted by the courts as to the unlawfulness of President Obama's actions on DAPA applied equally to DACA. This is a logical and obvious conclusion.

President Trump said the wind-down would not immediately terminate the two-year grants of immunity that DACA recipients had received. This would give Congress time to act if it believed the DACA program was something that should be authorized through federal immigration law.

Given the huge battle currently going on over immigration policy, funding for a border barrier and the partial government shutdown, it should come as no surprise that Congress did not act on DACA.

Instead, a number of challengers – including the University of California – went to court and managed to convince a federal district court judge and a panel of the 9th U.S. Circuit Court of Appeals to issue a court order preventing the Trump administration from ending DACA.

The lower court rulings defy not only common sense, but the Constitution.

It is untenable to claim that a subsequent president cannot end a program put in place by a prior president – particularly when courts have already held that prior executive action by a president on virtually the same issue was beyond his executive authority, violating the Constitution and statutory law.

No one questions that Congress could implement a DACA- or DAPA-type program. Congress can grant citizenship or amnesty to any immigrants it wants. But a president lacks the authority to do so.

The wisdom of the policy of allowing DACA recipients to spend the rest of their lives in the U.S. and eventually become citizens – as many Democrats in Congress advocate – is also questionable.

The media portrayal of DACA beneficiaries paints a uniformly rosy picture of highly educated, fluent individuals. But that is not in accord with the facts.

For example, according to the most recent figures only 49 percent of DACA beneficiaries havc attaincd a high school education despite a majority of them now being adults.

Almost no background checks were conducted by the Department of Homeland Security, resulting in illegal immigrants with criminal backgrounds being accepted into the DACA program, including members of the MS-13 criminal gang.

And one study estimates that perhaps as many as a quarter of DACA-eligible illegal immigrants are functionally illiterate in English, while another 46 percent have only "basic" English ability.

Providing amnesty and potential citizenship to DACA recipients and other illegal immigrants before we have a secure border will only encourage even more illegal immigration, just as the 1986 amnesty in the Immigration Reform and Control Act did.

That law provided citizenship to almost 3 million illegal immigrants and was supposed to solve the problem of illegal immigration. Yet within 10 years, there were another almost 6 million illegal immigrants in the U.S.

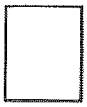
The federal government should be concentrating on enhancing immigration enforcement and border security to stem the flow of illegal immigrants into the country and reduce the number of them already in the interior of the U.S.

Until we achieve those goals, it is premature to consider any kind of benefits for any immigrants in the U.S. illegally.

The Supreme Court has a duty to take up the Trump administration's DACA appeal and throw out actions by lower courts that are not in accord with the Constitution and federal

immigration law. That action would send this issue of whether the DACA program should exist back to where it belongs – not to the president, as President Obama mistakenly believed, but to Congress.

This piece originally appeared in Fox News



COMMENTARY Immigration

Restrictions on Travel from Terrorist Safe Havens Are Not a "Muslim Ban"

Apr 30th, 2018 4 min read

Hans A. von Spakovsky

@HvonSpakovsky

Election Law Reform Initiative and Senior Legal Fellow

Hans von Spakovsky is an authority on a wide range of issues—including civil rights, civil justice, the First Amendment, immigration.

KEY TAKEAWAYS

Protesters at the Supreme Court were wrong.

As Francisco made clear, this proclamation cannot possibly be categorized as a Muslim ban.

The justices should rule in favor of upholding the president's authority to protect national security and the safety of the American public.

The weak arguments made on Wednesday in the Supreme Court against President Donald Trump's restrictions on travel from dangerous countries demonstrate that the government should win the case. The justices should rule in favor of upholding the president's authority to protect national security and the safety of the American public.

It was a rainy, overcast day in the nation's capital, but that did not stop protesters outside the Supreme Court who were yelling about the so-called Muslim ban, which exists only in their fevered imaginations. The weather also did not deter those attending the arguments inside the courtroom, which was packed with Washington's media and political elites, including Don McGahn, Trump's White House counsel, and legislators including Representative Bob Goodlatte, chairman of the House Judiciary Committee. Even Lin-Manuel Miranda, author of the Broadway musical Hamilton, was there.

The justices heard their final oral arguments of the term in U.S. v. Hawaii, the case filed against Trump's revised proclamation of September 24, 2017. That proclamation was issued after an intensive, multi-agency review applied to 200 countries. The Department of Homeland Security recommended that entry be restricted from eight countries that, as Noel Francisco, the solicitor general, told the Court, "failed to provide the minimum baseline of information needed to vet their nationals."

The countries included Iran and Syria, state sponsors of terrorism; Libya, Yemen, Chad, and Somalia, which have extensive terrorist activities inside their borders; and two non-Muslim countries, North Korea and Venezuela.

Francisco put on a very strong case on behalf of the government. He relied heavily on a straightforward provision of federal immigration law, whereby Congress gave the president the power to "suspend the entry of all aliens or any class of aliens" if he finds that their entry "would be detrimental to the interests of the United States." As Francisco argued, "the proclamation reflects a foreign-policy and national-security judgment that falls well within the president's power" under this federal law.

The solicitor general argued against the courts' getting involved in this, since "the whole vetting system is essentially determined by the executive branch. It's up to the executive branch to set it up. It's up to the executive branch to maintain it. And it's up to the executive branch to constantly improve it." He pointed out that prior presidents, Carter and Reagan, used this law to restrict entry from Iran and Cuba, and Justice Anthony Kennedy noted that Trump's proclamation contains more detail on the specifics of the grounds for the restrictions than did those prior presidential proclamations.

As Francisco made clear, this proclamation cannot possible be categorized as a Muslim ban. If it was supposed to be a Muslim ban, "it would be the most ineffective Muslim ban that one could possibly imagine, since not only does it exclude the vast majority of the Muslim world, it also omits three Muslim-majority countries that were covered by past orders, including Iraq, Chad, and Sudan."

The proclamation also "exerts diplomatic pressure on those countries [that fall below the baseline established by the Department of Homeland Security] to provide the needed information and to protect the country until they do." Chad improved its behavior, which is why it has since been taken off the September 24 list.

Trump's proclamation has a provision that allows the government to waive the entry restriction if an alien has family in the U.S., significant contacts through business, or professional obligations (including as a student or as an employee), needs urgent medical care, or has other "special circumstances" justifying his entry. Justice Stephen Breyer questioned Francisco about whether the waiver provision was real or not, citing a brief that claimed that a waiver had been granted to only two aliens.

Francisco noted that the information was wrong: Over 400 aliens had received waivers. Breyer also questioned how aliens could possibly know about the waiver process. Francisco noted that the waiver provisions are on the State Department's website and that consular officers at U.S. embassies automatically apply the waiver provisions. It was an odd question from Breyer. He seemed to be implying that the validity of the president's action depended on whether the government had advertised the waiver rules in foreign countries.

Neal Katyal, the lawyer for Hawaii, at one point told Justice Samuel Alito that Congress needed to read a "limit" into the statute that the president was relying on, even though there is no such limit in the law. He was in essence urging the Court to rewrite the statute. He also complained that the president's proclamation was "perpetual," as if it were somehow unlawful because it didn't have a "sunset" provision in it.

The solicitor general effectively refuted all of the legal arguments and false claims made against Trump, whose proclamation restricting entry from seven dangerous countries was within his authority as commander in chief and within the power given to him by Congress.

Justice Anthony Kennedy responded that the statute authorizes the president to act "for such period as he deems necessary." Katyal, as Kennedy joked, seemed to be arguing that the president was required to say "I'm convinced that in six months we're going to have a safe world."

Katyal significantly hurt his case further in response to a question from Chief Justice John Roberts, who asked about Trump's supposedly anti-Muslim statements that, Hawaii claims, prove the proclamation to be discriminatory. "If tomorrow [the president] issues a proclamation saying he's disavowing all those statements, then the next day he can reenter this proclamation?" Roberts asked. Katyal answered "yes" and admitted that if the president did that, then Hawaii's discrimination claims would no longer be applicable.

To Katyal's admission, Francisco pointed out in response that Trump had made clear on September 25 that "he had no intention of imposing the Muslim ban, . . . that Muslims in this country are great Americans and there are many, many Muslim countries who love this country and he has praised Islam as one of the great [religions] of the world."

The solicitor general effectively refuted all of the legal arguments and false claims made against Trump, whose proclamation restricting entry from seven dangerous countries was within his authority as commander in chief and within the power given to him by Congress by statute. The Supreme Court should rule against Hawaii, throw out its claims, and finally end this endless litigation, which has been a keystone of the Resist Trump movement.

This piece originally appeared in The National Review on 4/26/18

Seven Horrific Crimes by Illegal Immigrants that Networks BURIED

Bill D'Agostino *January 18th, 2019 7:30 AM*

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Broadcast networks really don't want to talk about illegal immigrant crime.

Last month, NewsBusters commended ABC, CBS, and NBC for spending a combined 28 minutes in their evening news broadcasts on the murder of Newman, California police Corporal Ronil Singh by an illegal alien. However, that coverage was a rare exception to broadcast television's overall lousy track record of burying crimes committed by individuals living in the U.S. illegally.

Crimes perpetrated by illegal aliens deserve attention because, by their very nature, all of them theoretically could have been prevented with sufficient enforcement of existing laws. Even if the crime rate among illegal aliens were a fraction of that among the native population, those few offenses still committed would be otherwise avoidable if the culprits had been either deported or prevented from entering in the first place.

MRC analysts examined Nexis transcripts of all network evening news coverage from 2018 and compiled the following list of some of the most heinous crimes committed by unlawful residents over the past year. None of these stories received even a second of evening news coverage – with the exception of the Colorado Spring Wildfire, which the networks briefly covered without mentioning the accused's immigration status.

Authorities: "Violent Crime Spree"

On December 16, 2018, Gustavo Garcia allegedly gunned down 51-year-old Rocky Jones at a Visalia, California gas station, in what authorities described as part of a "violent crime spree." Garcia, whom authorities also believe was responsible for a string of other shootings in the area, was previously ordered deported in 2014. His criminal record dates back to 2002.

Senior Citizen Dismembered, Beheaded

In November, Christian Ponce-Martinez reportedly killed, dismembered, and beheaded 76-year-old Georgia resident Robert Page. Ponce-Martinez had entered the United States illegally through Mexico just three months earlier. According to Clayton County police Major Craig Hammer, authorities found part of Page's body inside a cooler in Ponce-Matinez's house. "Other parts of his body were located under two tarps in the backyard," Hammer told local reporters.

Two-Day Multiple Homicide

Earlier in November, Springfield, Missouri residents Steven Marler and Aaron Hampton were allegedly killed at gunpoint by Mexican national Luis Rodrigo Perez. The following day, Perez allegedly shot and killed 21-year-old Sabrina Starr, and wounded two others. Perez had previously been detained in New Jersey on domestic violence charges in 2017. However, he was later released after the county rejected a detainer request from ICE, claiming the agency's request did not meet the proper criteria.

16 Year Old Stabbed to Death

On September 8, 2018, Sixteen-year-old Madison Wells of New Jersey was reportedly stabbed to death by **Bryan Cordero Castro**. Castro, 20, who came to the U.S. illegally from Guatemala, allegedly killed the teenager after she broke off a romantic relationship with him. According to reports, he had persistently asked Wells to meet with him in the days before the incident.

141 Counts of Arson

As NewsBusters noted **back in July**, all three networks abruptly stopped covering the Spring Creek Fire in Colorado following the arrest of **Jesper Joergensen**, a Danish national who was living in the U.S. on an expired visa. ABC and CBS ran one segment apiece about the suspect's arrest in connection with the conflagration, neither of which mentioned his immigration status. The wildfire continued into September, consuming over 100,000 acres and destroying 140 homes, but the networks never mentioned it again.

Bodies Dropped in the Street

In early June of 2018, a surveillance camera captured a man dropping the body of 41-year-old Ann Farrin on a Miami, Florida street corner. Authorities later identified the culprit as **Juan Carlos Hernandez-Caseres** of Honduras, who was in the country illegally. Hernandez-Caseres was also charged with the murder of Neidy Roche, another woman who had been found dead on a street corner in March of that year.

Healthcare Worker Suffocates Elderly Patients

In March of 2018, 81-year-old Lu Thi Harris was found "dead of apparent suffocation" in her Dallas, Texas home. Local police charged **Billy Chemirmir**, a Kenyan healthcare worker staying in the U.S. illegally, with Harris's murder. Chemirmir was also linked to the assault of a 91-year-old woman in Plano, Texas, who reported being robbed after a man forcibly held a pillow over her face. **More victims** have since come forward with similar claims, and police are now investigating Chemirmir for two other possible murders.

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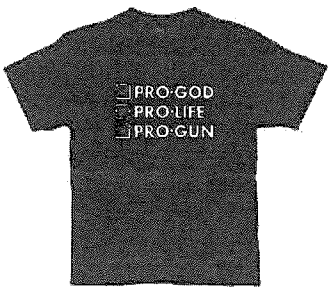

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Crime committed by undocum aliens is a real issue

BY NOLAN RAPPAPORT, OPINION CONTRIBUTOR — 10/19/20 11:30 AM EDT
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Is there a correlation between immigration and crime? Many studies have concluded that immigration does not increase crime.

According to an article in Scientific American, immigration-crime research over the past 20 years has corroborated the conclusions of a number of presidential commissions that immigration does not increase crime. in fact, the literature indicates that immigrants commit fewer crimes, on average, than native-born Americans.

But very few of these studies have focused on "illegal" immigration, as opposed to immigration generally, which includes legal as well as illegal.

Some of the reports on this research appear to be trying to discredit people who have expressed concern about immigrant crime, and it may be easier to do this if the research focuses on immigration generally without drawing attention to crimes committed by aliens who aren't supposed to be here in the first place.

Some organizations, however, such as the CATO Institute, have focused on the connection between illegal immigration and crime — and have not been able to get the necessary information.

CATO has just released a working paper on a study of the connection between illegal immigration and crime, but it is based on information from only one state. CATO was only able to get the information it needed from

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Texas, which apparently was the only state that records and keeps information about the immigration status of people entering the criminal justice system.

Information is available on undocumented aliens who have been incarcerated or taken into custody by the Federal Bureau of Prisons (BOP) and the US Marshals Service (USMS), because President Trump asked for it at the beginning of his administration.

On Jan. 25, 2017, Trump signed Executive Order 13768 on "Enhancing Public Safety in the Interior of the United States."

Section 16 of this order directs the DHS Secretary and the Attorney General to provide quarterly reports to congress on the immigration status of (a) aliens incarcerated under BOP supervision; (b) aliens incarcerated as federal pretrial detainees under the USMS supervision; and (c) convicted aliens incarcerated in state prisons and at local detention centers throughout the United States.

The most recent Alien Incarceration Report was issued on Oct. 16, 2020. It indicates that 94 percent of confirmed aliens incarcerated by the BOP and at USMS facilities are unlawfully present in the United States.

Additionally, 70 percent of the 27,494 known or suspected aliens in BOP custody had been convicted of non-immigration-related crimes, as had 39 percent of the 23, 580 known or suspected aliens in USMS custody.

But that information isn't even close to being comprehensive. Approximately 90 percent of the aliens incarcerated are held at state and local facilities.

This is a problem for two reasons.

First, it isn't possible to determine how much harm — if any — illegal immigration is doing without knowing how many of the aliens who are coming here illegally are committing crimes in the United States and how serious their crimes are.

Second, if Joe Biden is elected, he is going to need information about the criminal activities of undocumented aliens to be able to implement his immigration enforcement policies.

What does this have to do with Biden?

In his "Plan For Securing Our Values as a Nation of Immigrants," Biden says that he intends to follow the approach that the Obama-Biden administration took, which was to prioritize enforcement resources on removing deportable aliens who are threats to national security and public safety.

In fact, Biden intends to go even further than Obama did.

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At the March 15, 2020, Democratic primary debate, Biden said, "in the first 100 days of my administration, no one, no one will be deported at all. From that point on, the only deportations that will take place are for commissions of felonies in the United States of America."

The lack of information about the crimes being committed by undocumented aliens indicated by CATO wouldn't prevent a Biden administration from finding enough criminal aliens to keep ICE and the immigration courts busy, but it would make it impossible to focus enforcement efforts on the aliens who are committing the most serious crimes.

Nolan Rappaport was detailed to the House Judiciary Committee as an executive branch immigration law expert for three years. He subsequently served as an immigration counsel for the Subcommittee on Immigration, Border Security and Claims for four years. Prior to working on the Judiciary Committee, he wrote decisions for the Board of Immigration Appeals for 20 years. Follow him on Twitter @NolanR1 or at https://nolanrappaport.blogspot.com.

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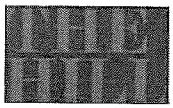

COMMENTARY Crime And Justice

Crimes by Illegal Immigrants Widespread Across U.S.—Sanctuaries Shouldn't Shield Them

Sep 3rd, 2019 4 min read

Hans A. von Spakovsky
@HvonSpakovsky
Election Law Reform Initiative and Senior Legal Fellow

Hans von Spakovsky is an authority on a wide range of issues—including civil rights, civil justice, the First Amendment, immigration.

KEY TAKEAWAYS

Non-citizens accounted for 24 percent of all federal drug arrests, 25 percent of all federal property arrests, and 28 percent of all federal fraud arrests.

In 2018, a quarter of all federal drug arrests took place in the five judicial districts along the U.S.-Mexico border.

Politicians who declare their jurisdictions to be sanctuaries for illegal immigrants who commit crimes are needlessly endangering their law-abiding citizens.

The decision by a California appeals court Friday overturning the conviction of an illegal immigrant who shot and killed Kate Steinle in San Francisco in 2015 once again put the national spotlight on the serious problem of crimes committed by people in the U.S. illegally.

The appeals court in San Francisco overturned the conviction of Jose Inez Garcia-Zarate on a charge of being a felon in possession of a firearm. Garcia-Zarate was earlier found not guilty of first- and second-degree murder, involuntary manslaughter and assault with a semi-automatic weapon.

Garcia-Zarate said he unwittingly picked up a gun, which he said was wrapped in a T-shirt, and it fired accidentally. The appeals court overturned his conviction on the firearm

possession charge because it said the judge at his trial failed to give the jury the option of finding him not guilty on the theory that he only possessed the gun for a moment.

Opponents of federal efforts to enforce the immigration laws enacted by Congress repeatedly claim that illegal immigrants are "less likely" to commit crimes than U.S. citizens – and thus represent no threat to public safety. But that's not true when it comes to federal crimes.

Non-citizens constitute only about 7 percent of the U.S. population. Yet the latest data from the Justice Department's Bureau of Justice Statistics reveals that non-citizens accounted for nearly two-thirds (64 percent) of all federal arrests in 2018. Just two decades earlier, only 37 percent of all federal arrests were non-citizens.

These arrests aren't just for immigration crimes. Non-citizens accounted for 24 percent of all federal drug arrests, 25 percent of all federal property arrests, and 28 percent of all federal fraud arrests.

In 2018, a quarter of all federal drug arrests took place in the five judicial districts along the U.S.-Mexico border. This reflects the ongoing activities of Mexican drug cartels. Last year, Mexican citizens accounted for 40 percent of all federal arrests.

In fact, more Mexicans than U.S. citizens were arrested on charges of committing federal crimes in 2018.

Migrants from Central American countries are also accounting for a larger share of federal arrests, going from a negligible 1 percent of such arrests in 1998 to 20 percent today.

Critics will try to downplay the importance of the Justice Department's report by pointing out that the majority of crimes in the United States are handled by prosecutors in state and local courts. But even there the data is shocking.

A recent report from the Texas Department of Public Safety revealed that 297,000 non-citizens had been "booked into local Texas jails between June 1, 2011 and July 31, 2019." So these are non-citizens who allegedly committed local crimes, not immigration violations.

The report noted that a little more than two-thirds (202,000) of those booked in Texas jails were later confirmed as illegal immigrants by the federal government.

According to the Texas report, over the course of their criminal careers those illegal immigrants were charged with committing 494,000 criminal offenses.

Some of these cases are still being prosecuted, but the report states that there have already been over 225,000 convictions. Those convictions represent: 500 homicides; 23,954 assaults; 8,070 burglaries; 297 kidnappings; 14,178 thefts; 2,026 robberies; 3,122 sexual assaults; 3,840 sexual offenses; 3,158 weapon charges and tens of thousands of drug and obstruction charges

These statistics reveal the very real danger created by sanctuary policies. In nine self-declared sanctuary states and numerous sanctuary cities and counties, officials refuse to hand over criminals who are known to be in this country illegally after they have served their state or local sentences.

This refusal to cooperate with federal immigration officials suggests that state and local officials supporting the sanctuary movement believe it's better to let these criminals return to their communities rather than being removed from this country. Not all of their constituents would agree.

The Texas report is careful to note that it is not claiming "foreign nationals" commit "more crimes than other groups." Whether that is true or not – and it is certainly true when it comes to federal crimes – is irrelevant.

What is highly relevant to the current debate about immigration policy is that the Texas report "identifies thousands of crimes that should not have occurred and thousands of victims that should not have been victimized because the perpetrators should not be here."

We know that in Texas and around the country some individuals would be alive today – and their families would not be mourning their loss – if we had a secure border and an effective interior enforcement system.

Instead of trying to obstruct enforcement of our immigration laws, state and local officials should do everything they can to help the feds reduce the very real – and all too often fatal – dangers posed by criminal illegal immigrants.

One of the worst recent examples of a state official who refuses to help federal immigration authorities carry out their duties is North Carolina Gov. Roy Cooper.

The Democratic governor recently vetoed a bill that would require local law enforcement to cooperate with federal immigration authorities. Cooper did so just days after Immigration and

Customs Enforcement (ICE) agents captured an illegal immigrant charged with first-degree rape and indecent liberties against a child.

The man arrested in that crime was on the loose because he had been released from custody by county officials, despite the existence of a federal detainer warrant for him.

Politicians who declare their jurisdictions to be sanctuaries for illegal immigrants who commit crimes are needlessly endangering their law-abiding citizens. That is shameful.

This piece originally appeared in Fox News

WIKIPEDIA

Shooting of Kate Steinle

On July 1, 2015, 32-year-old Kathryn ("Kate") Steinle was shot and killed while walking with her father and a friend along Pier 14 in the Embarcadero district of San Francisco. She was hit in the back by a single bullet. The man who fired the gun, José Inez García Zárate, said he had found it moments before, wrapped in cloth beneath a bench on which he was sitting, and that when he picked it up the weapon went off. The shot ricocheted off the concrete deck of the pier and struck the victim, who was about 90 feet away.[1] Steinle died two hours later in a hospital as a result of her injuries.

On November 30, 2017, after five days of deliberations, a jury acquitted García Zárate of all murder and manslaughter charges. He was convicted of being a felon in possession of a firearm, but that conviction was overturned on appeal on August 30, 2019.[2]

García Zárate's immigration status made the shooting controversial and led to political criticism of San Francisco's status as a sanctuary city, as García Zárate is an undocumented immigrant residing in the United States who had previously been deported five times. Donald Trump, at the time a presidential candidate, cited García Zárate in support of his proposal to deport criminal illegal immigrants living in the United States, and mentioned Steinle during his acceptance speech at the 2016 Republican National Convention.

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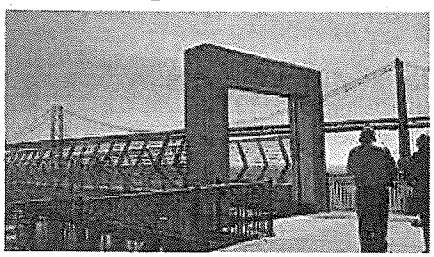
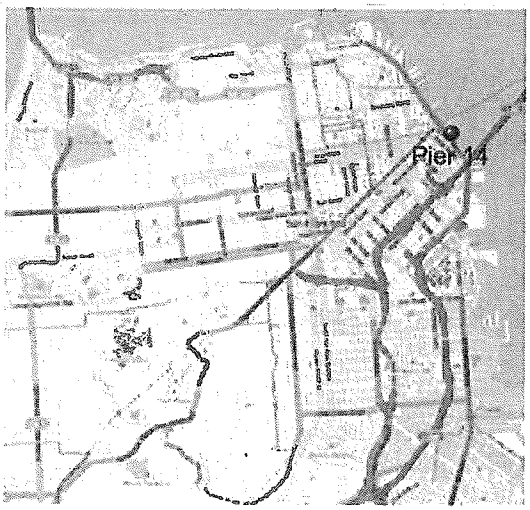
Shooting of Kate Steinle



Pier 14, site of the shooting



Shooting of Kate Steinle (San Francisco)

Location	Pier 14, San Francisco, California, United States
Date	July 1, 2015 6:30 p.m.
Weapon	.40-caliber SIG Sauer P239 handgun
Victim	Kate Steinle
Perpetrator	José Inez García Zárate (AKA Juan Francisco López-Sánchez) (in custody)

Shooting

García Zárate told ABC station KGO-TV in a jailhouse interview that he started wandering on Pier 14, a tourist attraction area at the Embarcadero waterfront district, Wednesday July 1, 2015 after taking sleeping pills he found in a dumpster. He said he then picked up a gun that he found.[3] García Zárate fired one shot from a .40-caliber SIG Sauer P239 handgun with a seven-cartridge magazine.[4][5] One bullet struck Steinle in the back and pierced her aorta. She collapsed to the pavement while screaming to her father, who was accompanying her at the pier, for help.[6] Her father and others performed CPR on Kathryn before paramedics arrived and took her to an ambulance. She died two hours later at San Francisco General Hospital.[6]

García Zárate was arrested about an hour after the shooting at Pier 40, about one mile (1.6 km) south of Pier 14, and divers from the San Francisco Police Department Underwater Recovery Unit found the gun in the bay alongside Pier 14 the following day.[7][8][9] On July 5, 2015, investigators returned to the pier and found a point 12–15 feet (3.7–4.6 m) from García Zárate's presumed location where a bullet had ricocheted off of the concrete.[10] Following his arrest, García Zárate was booked into San Francisco County Jail on suspicion of murder.[11][12]

The gun used by García Zárate had been stolen in downtown San Francisco from a Bureau of Land Management (BLM) ranger's personal vehicle on June 27, 2015, according to the Bureau of Land Management.[7] The ranger, John Woychowski, testified at trial that he had left the weapon holstered and unsecured in a backpack under the front seat of his personal vehicle while he went to dinner with his family.[13] The car's window had been broken.[14][15]

Victim

Kathryn Michelle (Kate) Steinle (December 13, 1982 – July 1, 2015) was originally from Pleasanton, California, grew up in Germany as a "military brat" and graduated from Amador Valley High School. She earned a communications degree from California Polytechnic State University, San Luis Obispo.[6][8] She was employed at Medtronic in San Francisco and was living on Beale Street, close to Pier 14, the site of the shooting.[16][8] Her funeral was held at a winery in Pleasanton on July 9.[17]

Perpetrator

José Inez García Zárate (or Juan Francisco López-Sánchez),[19] of Guanajuato, Mexico, is an undocumented immigrant who was deported from the U.S. a total of five times, most recently in 2009.[20] He was on probation in Texas at the time of the shooting.[21] He had seven felony convictions, none of them for violent crimes. When he was apprehended, García Zárate was listed as 45 years old by police, but as 52 in jail records.[22]

José Inez García Zárate	
Born	José Inez García Zárate Mexico
Nationality	Mexican
Other names	Juan Francisco López-Sánchez; Juan Jose Dominguez de la Parra
Occupation	Unemployed

García Zárate arrived in the U.S. sometime before 1991, the year he was convicted of his first drug charge in Arizona. He worked in Washington state in roofing and construction, and was also convicted three times there for felony heroin possession and manufacturing narcotics. Following another drug conviction and jail term, this time in Oregon, the U.S. Immigration and Naturalization

Service (INS) deported García Zárate in June 1994. However, García Zárate returned to the U.S. within two years and was convicted again of heroin possession in Washington state. He was deported for the second time in 1997.[19]

On February 2, 1998, García Zárate was deported for the third time, after reentering the U.S. through Arizona. United States Border Patrol caught him six days later at a border crossing, and a federal court sentenced García Zárate to five years and three months in federal prison for unauthorized reentry. Immigration and Customs Enforcement (ICE), successor of the INS, deported García Zárate in 2003 for his fourth deportation. However, he reentered the U.S. through the Texas border and got another federal prison sentence for reentry before being deported for the fifth time in June 2009.[19]

Less than three months after his fifth deportation, García Zárate was caught attempting to cross the border in Eagle Pass, Texas. He pleaded guilty to felony reentry; upon sentencing, a federal court recommended García Zárate be placed in "a federal medical facility as soon as possible".[19]

Criminal status	Acquitted of murder in state court, currently incarcerated pending federal trial; convicted of being a felon in possession of a firearm
Criminal charge	Second-degree murder, enhancement of using a firearm, being a felon in possession of a firearm[18]
Capture status	Arrested on July 1, 2015

On March 26, 2015, at the request of the San Francisco Sheriff's Department (SFSD), United States Bureau of Prisons (BOP) had turned García Zárate over to San Francisco authorities for an outstanding drug warrant.[23] San Francisco officials transported García Zárate to San Francisco County Jail on March 26, 2015, to face a 20-year-old felony charge of selling and possessing marijuana after García Zárate completed his latest prison term in San Bernardino County for entering in the country without the proper documents.[24]

U.S. Immigration and Customs Enforcement (ICE) had issued a detainer for García Zárate requesting that he be kept in custody until immigration authorities could pick him up. However, as a sanctuary city, San Francisco's "Due Process for All" ordinance[25] restricted cooperation with ICE to only cases where the immigrant had both current violent felony charges and past violent felony convictions; therefore, San Francisco disregarded the detainer and released him.[26][27] He was released from San Francisco County Jail on April 15, 2015, and had no outstanding warrants or judicial warrants, as confirmed by the San Francisco Sheriff's Department.[21]

Legal proceedings

García Zárate was formally charged with first-degree murder and possession of illegal narcotics on July 6. García Zárate admitted in a KGO-TV interview that he committed the shooting but said he found the gun wrapped in a T-shirt under a bench after taking sleeping pills he found from a trash can. He first claimed that he was aiming at sea lions, then that the gun had fired while he was picking up the wrapped package, and that Steinle's shooting was accidental.[28][22] During a pretrial hearing, a judge disallowed the interview to be used as evidence.[29] García Zárate pleaded not guilty to the charges, and was held on $5 million bail.[30] García Zárate's attorney, Matt Gonzalez, stated in court that the shooting was likely accidental.[31]

On July 28, prosecutors filed an additional charge against García Zárate: being a felon in possession of a firearm.[32] On September 4, San Francisco Superior Court Judge Brendan Conroy stated that there was enough evidence to try García Zárate. Initially charged with first-degree murder, García Zárate was eventually tried for second-degree murder. If found guilty of the charges of second-degree murder, being

a felon in possession of a firearm, and an enhancement of using a firearm, García Zárate could have faced life in prison without the possibility of parole. The jury also had the option of deciding if he was guilty of involuntary manslaughter (where the death occurs without intent but "through the negligent or reckless actions of the defendant".[33][18][34]

In August, a judge set December 2 as the date to assign the case to a judge for trial. García Zárate's public defender said there were no discussions of a plea deal.[35] However, the trial date set for December 2016 was postponed. García Zárate returned to court July 14, 2017.[36][37] The trial was postponed again on July 25, but the defendant asserted his right to a speedy trial, meaning that the trial was required to begin within 60 days.[38]

The trial began October 23, 2017, with opening statements and a brief testimony from Steinle's father.[39] On subsequent days, jurors heard testimonies from eyewitnesses of the shooting, local investigators and the BLM ranger whose stolen gun was used in the crime.[13][40][41][42][43][44] Police revealed how they had lied to García Zárate in order to motivate him to confess to the shooting by saying that they had more evidence than had actually been collected at the time.[45] The prosecution contended he brought the stolen gun to the crime scene while the defense claimed the weapon was found under a Pier 14 seat.[46]

The defense called its first witness, the crime lab supervisor, after the prosecution rested its case after two weeks of testimony. Their case was that the shooting was accidental and occurred when García Zárate picked up the newly found gun.[47][48][49] Experts regarding video enhancement and Spanish translation were heard to bolster the claim of an accidental shooting and incomplete investigation.[50][51][52][53]

A key point of contention was the ease with which the weapon could have been fired accidentally. A supervising criminologist at the San Francisco Police Department crime lab testified that the gun was in excellent condition and would not have fired without someone pulling the trigger. The defense emphasized that the Sig Sauer pistol has no external safety mechanism to prevent accidental firing, and pointed to a record of even police trained in the use of Sig Sauer pistols having made accidental discharges. As examined by the criminologist, it was placed in single-action mode (where the hammer is cocked), rather than double-action mode (where a single pull of the trigger both cocks and releases the hammer). While it is typical for a gun that has been fired to be in single-action mode, a gun in single-action mode also requires less trigger pressure to fire. The defense argued that this made it more plausible that García Zárate could have pulled the trigger accidentally while picking up or unwrapping the bundled gun. Woychowski, a BLM ranger, testified that he always left the pistol in double-action mode, but that he typically loaded it in single-action mode, and couldn't definitively say that he had returned it to double-action mode before it was stolen.[44] The defense rested its case after four days.[54][55]

Prior to closing arguments, Judge James Feng agreed to a request by the prosecutor Diana Garcia to instruct the jury in first-degree murder, second-degree murder, and involuntary manslaughter. "The jury will be instructed on multiple theories of homicide," said District Attorney's Office spokesman Alex Bastian.[56][57]

Jury deliberations began after 12 days of testimony, dozens of witnesses and two days of closing arguments on November 21, 2017.[58][59]

On November 30, 2017, after five days of deliberations, the jury acquitted García Zárate of all murder and manslaughter charges, but convicted him of being a felon in possession of a firearm.[60]

The Department of Justice unsealed a federal arrest warrant for García Zárate following his trial. The charges include felon in possession of a firearm, involuntary manslaughter, and assault with a deadly weapon. There is an existing federal detainer for García Zárate to be transported to the Western District of Texas by U.S. Marshals.[61][62]

On January 11, 2019, García Zárate filed an appeal of his felon in possession conviction in the First Appellate District of the California Court of Appeal.

On August 30, 2019, the California state 1st District Court of Appeals overturned the gun conviction saying "the judge failed to instruct the jury on one of his defenses".[63]

Investigation

The gun used in the shooting was confirmed by forensic crime laboratory technicians to be the same one stolen from a federal agent's car. The .40-caliber handgun had been taken from a U.S. Bureau of Land Management (BLM) ranger's car that was parked in downtown San Francisco, on June 27, 2015.[64] The ranger, John Woychowski, was in San Francisco for an official government business trip. He testified at trial that he had left the weapon holstered and unsecured in a backpack under the front seat of his personal vehicle while he went to dinner with his family.[13] Woychowski immediately reported the theft to San Francisco police, as well as the Federal Bureau of Investigation's National Crime Information Center. Police issued a citywide crime alert but did not call in CSI technicians to examine the scene.[24]

Ballistics experts for both the prosecution and defense agreed with the investigators finding that, after García Zárate fired the gun, the bullet ricocheted off the pavement 12–15 feet (3.7–4.6 m) away from him before traveling another 78 feet (24 m) and striking Steinle.[65][66]

Family lawsuit

In September 2015, the Steinle family announced their intention to file a lawsuit against the City of San Francisco, Immigration and Customs Enforcement and Bureau of Land Management, alleging complicity and negligence in the death of their daughter.[67] On January 7, 2017, Magistrate Judge Joseph C. Spero dismissed the family's claims against San Francisco and former Sheriff Ross Mirkarimi. The magistrate also dismissed their claim against ICE, but he ruled that the lawsuit accusing the Bureau of Land Management of negligence can proceed.[68][69]

In January 2020, the United States Court of Appeals for the Ninth Circuit ruled that Kate's family could not sue the city of San Francisco.[70][71]

Reaction

The killing sparked fierce criticism and political debate over San Francisco's sanctuary city policy, which disallows local officials from questioning a resident's immigration status, thus enabling local victims to report crimes without fear of deportation. Multiple Republican presidential candidates, including Donald Trump and Jeb Bush, made statements blaming the immigration policy for Steinle's death; Trump further called for the need for a secure border wall.[72][73] White House Press Secretary Josh Earnest stated that the U.S. would be safer if Republican lawmakers had approved comprehensive immigration reform backed by President Barack Obama.[74]

2016 U.S. presidential candidate Hillary Clinton joined California Senator and former San Francisco Mayor Dianne Feinstein, a Democrat, in condemning the policy. Clinton said, "The city made a mistake, not to deport someone that the federal government strongly felt should be deported ... So I have absolutely no support for a city that ignores the strong evidence that should be acted on."[75] That same week, Feinstein penned a public letter to San Francisco Mayor Ed Lee that stated, "The tragic death of Ms. Steinle could have been avoided if the Sheriff's Department had notified ICE prior to the release of Mr. Sanchez, which would have allowed ICE to remove him from the country."[76]

Local and state reaction

San Francisco County Sheriff Ross Mirkarimi received criticism by anti-illegal immigration activist groups, including Californians for Population Stabilization, and a range of politicians, including San Francisco Mayor Ed Lee and California U.S. Senator Dianne Feinstein, for García Zárate's release from custody before the shooting. Lee stated the sanctuary city ordinance allows the sheriff to coordinate with federal immigration and ICE agents. On July 7, Feinstein stated that the San Francisco County Sheriff's Department should have notified ICE before García Zárate was released, so that he could be deported from the county.[77] In a press conference held on July 10, Mirkarimi blamed federal prison and immigration officials for the series of events that led up to the release of García Zárate.[23][78][79]

Ross Mirkarimi lost his bid for re-election to Vicki Hennessy on November 3, 2015, receiving 38% of the vote.[80]

Political reactions

The Donald Trump presidential campaign for the 2016 election released the political advertisement "Act of Love", showing García Zárate and criticizing rival Jeb Bush's policy on immigration.[81] Later, when accepting the Republican nomination for president at the 2016 Republican National Convention, Trump mentioned Steinle's death as a rationale to deport illegal aliens in the United States.[82] After the 2017 Presidential Inauguration, President Trump again mentioned Steinle and other victims of violent crime by illegal aliens when creating the Victims of Immigration Crime Engagement (VOICE) Office within ICE.[83]

Kate's Law

In response to the controversy, U.S. Senator Ted Cruz from Texas and U.S. Representative Matt Salmon from Arizona introduced H.R. 3011 (https://www.congress.gov/bill/114th-congress/house-bill/3011), the Establishing Mandatory Minimums for Illegal Reentry Act of 2015, also known as Kate's Law.[84][85] No vote was ever held.[86] In July 2015, however, the House did pass the Enforce the Law for Sanctuary Cities Act (H.R. 3009 (https://www.congress.gov/bill/114th-congress/house-bill/3009)), a related bill that is often confused with Kate's Law.[86]

Members of Steinle's family did not want her to be in the middle of a political controversy, according to the San Francisco Chronicle, and actually support sanctuary cities. "I don't know who coined 'Kate's Law,'" Kate's father Jim Steinle told the paper. "It certainly wasn't us."[87]

In July 2016, a Senate version of the law (S. 2193 (https://www.congress.gov/bill/114th-congress/senate-bill/2193)) was filibustered with the motion to invoke cloture receiving 55–42 votes mostly by Senate Republicans, therefore insufficient to defeat the filibuster.[88][89] The Senate also voted on another bill

often confused with Kate's Law, the Stop Dangerous Sanctuary Cities Act (S. 3100 (https://www.congress.gov/bill/114th-congress/senate-bill/3100)). The bill failed to proceed to a final vote in the Senate.[90]

On June 23, 2017, U.S. Representative Bob Goodlatte from Virginia reintroduced two bills, Kate's Law (H.R. 3004 (https://www.congress.gov/bill/115th-congress/house-bill/3004)) and No Sanctuary for Criminals, an anti-sanctuary city policy (H.R. 3003 (https://www.congress.gov/bill/115th-congress/house-bill/3003)), into the House which passed on June 29 and proceeded to the Senate.[91][92]

See also

- Illegal immigration to the United States and crime
- Office of Victims of Immigration Crime Engagement
- Killing of Mollie Tibbetts

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COMMENTARY Immigration

How Open Borders and Sanctuary Policies Victimize (and Kill) Americans

Jun 10th, 2019 4 min read

Commentary By

Hans A. von Spakovsky

Election Law Reform Initiative and Senior Legal Fellow

Greg Walsh

Summer 2019 member of the Young Leaders Program at The Heritage Foundation

KEY TAKEAWAYS

The Border Patrol intercepted more than 144,000 illegal aliens at the southwest border in May, the largest monthly total in more than a dozen years.

They are allowing dangerous criminals into the country and are creating sanctuaries for them to repeatedly victimize Americans and endanger the safety of the public.

There are many Americans who would be alive today if we had control over our southern border and if there were no sanctuary policies in place.

The supporters of open borders and sanctuary policies that obstruct enforcement of our immigration laws must be overjoyed by the latest report from the Department of Homeland Security.

The Border Patrol intercepted more than 144,000 illegal aliens at the southwest border in May, the largest monthly total in more than a dozen years.

Those who push these policies should be ashamed of themselves.

As a gruesome murder in Maryland of a 14-year-old girl demonstrates, they are allowing dangerous criminals into the country and are creating sanctuaries for them to repeatedly victimize Americans and endanger the safety of the public.

There are literally hundreds of thousands of individuals who are being killed, raped, assaulted, robbed, beaten, and kidnapped by criminal illegal aliens in this country, aliens who are protected by sanctuary jurisdictions, such as Prince George's County, Maryland.

In one of the latest tragedies caused by these reckless policies, on April 18, Ariana Funes-Diaz (who went missing from a group home for girls) was forced to strip and was then beaten with a baseball bat, slashed with a machete, and slain.

Three teenagers are in custody, accused of this heinous crime, at least two of whom are in the country illegally and are self-identified members of the notorious MS-13 gang, which has plagued citizens across the continental United States. One of them came through the refugee resettlement process. A fourth accomplice, who actually recorded the atrocity, was just recently arrested.

There is little doubt that Funes-Diaz would be alive today if it weren't for the sanctuary policy of Prince George's County. The two illegal aliens (Salvadoran nationals) accused of her killing were previously arrested on charges of attempted murder, participation in gang activity, conspiracy to commit murder, attempted robbery, and other related crimes.

Immigration and Customs Enforcement sent detainer warrants to the Prince George's County Corrections Department over a year ago asking it to notify ICE when the aliens were scheduled for release so ICE could pick them up for deportation.

But because of the county's irresponsible sanctuary policy, the ICE detainer was ignored, and the illegal aliens—members of one of the most dangerous criminal gangs in the Western Hemisphere—were blithely released back into the community so they could commit further crimes.

As Justine Whelan, an ICE spokeswoman, said, "It's hard to imagine that anyone would not be interested in ensuring that people like this are not on the streets, doing bad things, after demonstratively violent behavior."

But Prince George's County is unapologetic about the brutal slaying that happened as a result of its policy. Its director of corrections, Mary Lou McDonough, was defiant over the county's sanctuary policy, telling The Washington Post that ICE knows that "we will never hold anybody for ICE."

The location of Funes-Diaz's killing is a tragic, telling element. Had she lived just a few miles south in Prince William County, Virginia, the killers would probably not have been in the country, due to their prior crimes.

Prince William County has an agreement with the Department of Homeland Security (and by extension, with ICE) through the 287(g) program, which checks the immigration status of arrestees and detains them for ICE to pick up and deport.

Despite its success, the future of the program there is in peril, as the two Democratic candidates for sheriff running against the incumbent, Glen Hill, favor eliminating the program.

The Prince William Board of County Supervisors chairman, Corey Stewart, said the program has been successful in curbing further criminal activity among illegal aliens.

He warns that "[i]f the county rescinds 287(g), MS-13 comes back with a vengeance, because it will send a big signal that the county will turn a blind eye to criminal illegal-alien gang activity."

Unfortunately, there is nothing isolated about what happened to Funes-Diaz.

A 2005 report by the Government Accountability Office on the criminal histories of 55,322 illegal aliens in prison showed that they had been arrested 459,614 times for some 700,000 criminal offenses.

A 2011 GAO analysis found that 251,000 criminal aliens in federal, state, and local prisons and jails had been arrested nearly 1.7 million times for close to 3 million criminal offenses ranging from homicide and kidnapping to drugs, burglary, and larceny.

In January 2018, Rio Grande Valley Sector Chief Patrol Agent Manuel Padilla Jr. noted that the Border Patrol had "apprehended 53 MS-13 gang members," which represented "an increase of 212 percent over the same period in 2017."

A teenage girl was killed in cold blood fewer than 15 miles from the Capitol, and still Congress is incapable of working with the White House to combat this scourge of lawlessness.

Furthermore, counties and cities in Maryland and elsewhere not only refuse to assist federal authorities in their efforts to get dangerous criminal aliens out of the country, they implement

policies intended to obstruct and interfere with those federal efforts, endangering the residents of their communities.

The killing of Funes-Diaz brings to mind another tragedy, the 2015 slaying of Kate Steinle by an illegal alien, previously deported five times, who was released due to the city of San Francisco's sanctuary policy despite an ICE detainer warrant.

The Remembrance Project, "a voice for victims killed by illegal aliens," was welcomed at the White House in June 2018 for its work in trying to help the families of those victims.

Anyone who doubts the effects of open borders and sanctuary policies should visit the Remembrance Project's Twitter account, where you will be immediately confronted with the heartbreaking frequency of killings committed by a growing population of criminal illegal aliens.

President Ronald Reagan once noted "a nation that cannot control its borders is not a nation," a comment that encapsulates the political and cultural issues resulting from the virtually unimpeded stream of illegal aliens coming across America's southern border: abandonment of law and order and public safety, and huge economic costs imposed on local communities.

There is one thing we know for sure. There are many Americans who would be alive today if we had control over our southern border and if there were no sanctuary policies in place.

This piece originally appeared in The Daily Signal

ANALYSIS

Q&A: Trump's Muslim Ban at the Supreme Court

On Wednesday, the U.S. Supreme Court will hear arguments against the third iteration of President Donald Trump's Muslim ban. Faiza Patel says this will be a test for just how much the Supreme Court is willing to rein in an "obviously bigoted policy."

Faiza Patel April 24, 2018

On Wednesday, the U.S. Supreme Court will hear arguments against the third iteration of President Donald Trump's Muslim ban. The case – ***Hawaii v. Trump*** – is the culmination of several challenges to the discriminatory and the Brennan Center argues, illegal policy. The Center filed its **own suit** against the ban, alongside the Council on American-Islamic Relations, representing six American Muslim plaintiffs. Those plaintiffs are just a small subset of the thousands of Americans and their families who are suffering harm since the Court allowed the ban to be implemented in December of 2017.

Co-director of the Brennan Center's Program on Liberty and National Security Faiza Patel says Wednesday's arguments will be a test for just how much the Supreme Court is willing to rein in an "obviously bigoted policy."

How did this all get started?

Faiza Patel: During his campaign, now-President Trump promised to ban Muslims from the US. This generated a huge amount of shock, and a week into his presidency, he decided to implement his campaign promise. He issued an order that banned people from seven mostly-Muslim countries from coming to the US. What's currently in the court is the third version issued in September 2017.

Like the bans that came before it, this third iteration was challenged, and like the previous two, federal district courts and courts of appeals have all said the plaintiffs have shown a likelihood of success on their argument that

the ban is illegal and unconstitutional.

What arguments will likely come up before the justices?

FP: Attorneys for the state of Hawaii will argue that the ban violates the 1965 Immigration and Nationality Act [INA], which prohibits discrimination on the basis of, among other things, religion and nationality. Prior to 1965, our immigration laws operated in an explicitly discriminatory way, setting quotas that heavily favored immigration from Western European countries. The INA passed amid the civil rights era and took a very different tack: it did away with national-origin quotas and emphasized family reunification and the need to meet labor needs.

Attorneys for Hawaii will also argue that the ban violates what's known as the establishment clause of First Amendment, which prohibits the government from favoring or disfavoring a certain religion. The argument is that it's obvious the intent of the ban was to keep Muslims out of the US, which is effectively the US government disfavoring people solely based on their religion.

But didn't the Trump administration modify the ban to avoid the appearance of explicitly banning Muslims?

FP: One of the big questions in this case is whether or not the court will restrict itself to looking at the four corners of the order or will actually look at the context. President Trump has explicitly said he wants to keep Muslims out of the country, and has never backed down from his stated goal. He hasn't called it a Muslim ban recently, but he continues to portray Muslims as terrorists while remaining conspicuously silent about other types of violence, especially violence perpetrated against minorities.

In this instance, when courts are looking at the establishment clause, they're asking: what was the government's intent? Are they intending to discriminate against one religion, or are they being neutral? As they say, you can try and put lipstick on a pig, but it's still a pig.

Who are the people suing the government?

FP: There are two kinds of plaintiffs. There are institutional plaintiffs like the state of Hawaii, which is suing because as a state, they say they've been injured. Then you have individuals who've themselves been harmed by the ban. One thing to remember is that this case isn't being brought on behalf of foreigners overseas. It's brought on behalf of people here in the US who are injured because, for example, they can't bring family members over.

In our case, for instance, **Fahed Muqbil** is an American citizen who grew up in Mississippi. He went to Yemen and married a woman, had two kids, and then moved to Egypt. One of his daughters suffers from spina bifida, and so Fahed decided to bring her to the US for treatment. But his wife and other daughter were stuck in Egypt, banned from receiving a visa. A mother was kept from her daughter's side simply because she has a Yemeni passport. An American citizen was separated from his wife and child. These are the types of injuries that result from the ban.

Traditionally, courts have been deferential when it comes to national security and the president's powers. How might this case be different?

FP: This is the first time the Supreme Court will hear a direct challenge to one of President Trump's policies, so we'll be watching to see how the justices react to the government's arguments. So far, the federal courts have been skeptical of this administration in a lot of contexts; we've seen this with the transgender ban and arguments over sanctuary cities.

In the case of the Muslim ban, we have clear anti-Muslim intent. They can dress is up as national security, but there is so much evidence of the administration's animus toward Muslims that it's difficult to ignore. It will also be interesting to see how much the court is willing to stray from its traditional deference when it comes to cases of national security. Often the court is willing to show leeway when it comes to the president's national security powers. But the court has also pushed back. We saw that around some of the Guantanamo cases where the court intervened and restricted the executive branch.

Lurking in the background of all of this is a case called *Korematsu v. United States*. *Korematsu* was a case challenging the internment of Japanese citizens during World War Two. The Supreme Court actually upheld the unjustified internment of American citizens. And in the decades since, it's clear that decision was wrong and is reflective of shameful racial prejudice. Here, some 70 years later, the government is trying to make the same assumptions that were made about Japanese Americans: that your ethnicity or your nationality or your religion gives some indication of your dangerousness.

We won't hear a decision for a few months, but what do you think will make this case stand out in history?

FP: It will for many reasons. First, it raises significant issues of executive power. Second, it's the first time the establishment clause has been invoked in an immigration case. And third, leaving the legal issues aside, the outcome will have an enormous impact on the Muslim American community and how it perceives its place in the US. It's also going to have a huge impact on how the rest of the world perceives the United States. We've always been justly proud of our court system and the separation of powers. The world is watching to see if the Supreme Court will stand up to this obviously bigoted policy.

(Image: **Flickr.com**)

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Trump's Travel Ban Is Upheld

By Adam Liptak and Michael D. Shear

June 26, 2018

WASHINGTON — The Supreme Court upheld President Trump's ban on travel from several predominantly Muslim countries, delivering to the president on Tuesday a political victory and an endorsement of his power to control immigration at a time of political upheaval about the treatment of migrants at the Mexican border.

In a 5-to-4 vote, the court's conservatives said that the president's power to secure the country's borders, delegated by Congress over decades of immigration lawmaking, was not undermined by Mr. Trump's history of incendiary statements about the dangers he said Muslims pose to the United States.

Writing for the majority, Chief Justice John G. Roberts Jr. said that Mr. Trump had ample statutory authority to make national security judgments in the realm of immigration. And the chief justice rejected a constitutional challenge to Mr. Trump's third executive order on the matter, issued in September as a proclamation.

The court's liberals denounced the decision. In a passionate and searing dissent from the bench, Justice Sonia Sotomayor said the decision was no better than Korematsu v. United States, the 1944 decision that endorsed the detention of Japanese-Americans during World War II.

She praised the court for officially overturning Korematsu in its decision on Tuesday. But by upholding the travel ban, Justice Sotomayor said, the court "merely replaces one gravely wrong decision with another."

The court's travel ban decision provides new political ammunition for the president and members of his party as they prepare to face the voters in the fall. Mr. Trump has already made clear his plans to use anti-immigrant messaging as he campaigns for Republicans, much the way he successfully deployed the issue to whip up the base of the party during the 2016 presidential campaign.

Mr. Trump, who has battled court challenges to the travel ban since the first days of his administration, hailed the decision to uphold his third version as a "tremendous victory" and promised to continue using his office to defend the country against terrorism, crime and

extremism.

"This ruling is also a moment of profound vi
commentary from the media and Democrati
secure our border and our country," the pres
House soon after the decision was announce

The vindication for Mr. Trump was also a stu
strategy of obstruction throughout 2016 that prevented President Barack Obama from seating Judge Merrick B. Garland on the nation's highest court after the death of Justice Antonin Scalia. Justice Neil M. Gorsuch, Mr. Trump's choice to sit on the court, was part of the majority upholding the president's travel ban.

The decision came even as Mr. Trump is facing controversy over his decision to impose "zero tolerance" for illegal immigration at the United States' southwestern border, leading to politically damaging images of children being separated from their parents as families cross into the country without proper documentation.

But as Mr. Trump celebrated his travel ban victory, a federal judge in California ordered the government to stop separating children from their parents at the border and to reunite families already separated.

Late Tuesday night, the judge said that all families must be reunited within 30 days and that children under 5 must be returned to the custody of their parents within two weeks.

The judge's order came as the president faces a second legal challenge about the family separations. Seventeen states and the District of Columbia filed a lawsuit on Tuesday in federal court seeking to stop the practice.

Mr. Trump and his advisers have long argued that presidents are given vast authority to reshape the way that the United States controls its borders. The president's attempts to do that began with the travel ban and continues today with his demand for an end to the "catch and release" of unauthorized immigrants.

In remarks on Tuesday in a meeting with lawmakers, Mr. Trump vowed to continue fighting for a wall across the southern border with Mexico — his favorite physical manifestation of the legal powers that the court says he rightly wields.

"We have to be tough and we have to be safe
construction of the wall "stops the drugs."

"It stops people we don't want to have," the p

Several hundred angry protesters gathered i
signs that read, "No Ban, No Wall," "Resist T

In New York City, about three dozen activists, government officials and concerned citizens declared at a midday news conference that the court was on the "wrong side of history." Bitta Mostofi, the commissioner of immigrant affairs for the New York mayor's office, called the ruling an "institutionalization of Islamophobia and racism."

Senator Robert Menendez, Democrat of New Jersey, wrote that "today is a sad day for American institutions, and for all religious minorities who have ever sought refuge in a land promising freedom." The Baptist Joint Committee for Religious Liberty said in a statement that "we are deeply disappointed by the Supreme Court's refusal to repudiate policy rooted in animus against Muslims."

Mr. Trump's ban on travel had been in place since December, when the court denied a request from challengers to block it. Tuesday's ruling lifts the legal cloud over the policy.

Chief Justice Roberts acknowledged that Mr. Trump had made many statements concerning his desire to impose a "Muslim ban." He recounted the president's call for a "total and complete shutdown of Muslims entering the United States," and he noted that the president has said that "Islam hates us" and has asserted that the United States was "having problems with Muslims coming into the country."

But the chief justice said the president's comments must be balanced against the powers of the president to conduct the national security affairs of the nation.

"The issue before us is not whether to denounce the statements," Chief Justice Roberts wrote. "It is instead the significance of those statements in reviewing a presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."

"In doing so," he wrote, "we must consider not only the statements of a particular president, but also the authority of the presidency itself."

The chief justice repeatedly echoed Stephen Miller, Mr. Trump's top immigration adviser, in citing a provision of immigration law that gives presidents the power to "suspend the entry of all aliens or any class of aliens" as they see necessary.

The provision "exudes deference to the president in every clause," the chief justice said.

He concluded that Mr. Trump's proclamation
by national security concerns. Chief Justice
legitimate purposes: preventing entry of nat
inducing other nations to improve their prac

Even as it upheld the travel ban, the court's
the Korematsu case, officially reversing a wa
emblem of a morally repugnant response to fear.

Chief Justice Roberts said Tuesday's decision was very different.

"The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of presidential authority," he wrote. "But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission."

"The entry suspension is an act that is well within executive authority and could have been taken by any other president — the only question is evaluating the actions of this particular president in promulgating an otherwise valid proclamation," Chief Justice Roberts wrote.

Justices Anthony M. Kennedy, Clarence Thomas, Samuel A. Alito Jr. also joined the majority opinion.

In her dissent, Justice Sotomayor lashed out at Mr. Trump, also quoting many of the anti-Muslim statements. She noted that, on Twitter, he retweeted three anti-Muslim videos as president and tweeted that "we need a TRAVEL BAN for certain DANGEROUS countries."

"Let the gravity of those statements sink in," Justice Sotomayor said. "Most of these words were spoken or written by the current president of the United States."

She dismissed the majority's conclusion that the government succeeded in arguing that the travel ban was necessary for national security. She said that no matter how much the government tried to "launder" Mr. Trump's statements, "all of the evidence points in one direction."

Justice Sotomayor accused her colleagues in the majority of "unquestioning acceptance" of the president's national security claims. Justice Ruth Bader Ginsburg joined Justice Sotomayor's dissent. Justice Sotomayor accused the court of inconsistency, noting that a stray remark from a state commissioner expressing hostility to religion was the basis of a ruling this month in favor of a Christian baker who refused to create a cake for a same-sex wedding.

"Those principles should apply equally here,"
whether a government actor exhibited tolera
affects individuals' fundamental religious fre

In a second, milder dissent, Justice Stephen
questioned whether the Trump administrati
"the proclamation's elaborate system of exer

Justice Kennedy agreed that Mr. Trump should be allowed to carry out the travel ban, but he emphasized the need for religious tolerance.

"The First Amendment prohibits the establishment of religion and promises the free exercise of religion," he wrote. "It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."

The court's decision, a major statement on presidential power, is the conclusion of a long-running dispute over Mr. Trump's authority to make good on his campaign promises to secure the United States' borders.

Only a week after he took office, Mr. Trump issued his first travel ban, causing chaos at the country's airports and starting a cascade of lawsuits and appeals. The first ban, drafted in haste, was promptly blocked by courts around the United States.

A second version, issued two months later, fared little better, although the Supreme Court allowed part of it go into effect last June when it agreed to hear the Trump administration's appeals from court decisions blocking it. But the Supreme Court dismissed those appeals in October after the second ban expired.

In January, the Supreme Court agreed to hear a challenge to Mr. Trump's third and most considered entry ban, the one issued as a presidential proclamation. It initially restricted travel from eight nations — Iran, Libya, Syria, Yemen, Somalia, Chad, Venezuela and North Korea — six of them predominantly Muslim. Chad was later removed from the list.

The restrictions varied in their details, but, for the most part, citizens of the countries were forbidden from emigrating to the United States, and many of them are barred from working, studying or vacationing here. In December, the Supreme Court allowed the ban to go into effect while legal challenges moved forward.

The State of Hawaii, several individuals and
limits on travel from the predominantly Mus
portions concerning North Korea and Venezu
ones, was tainted by religious animus and nc
concerns.

The challengers prevailed before a Federal D
before a three-judge panel of the United States Court of Appeals for the Ninth Circuit.

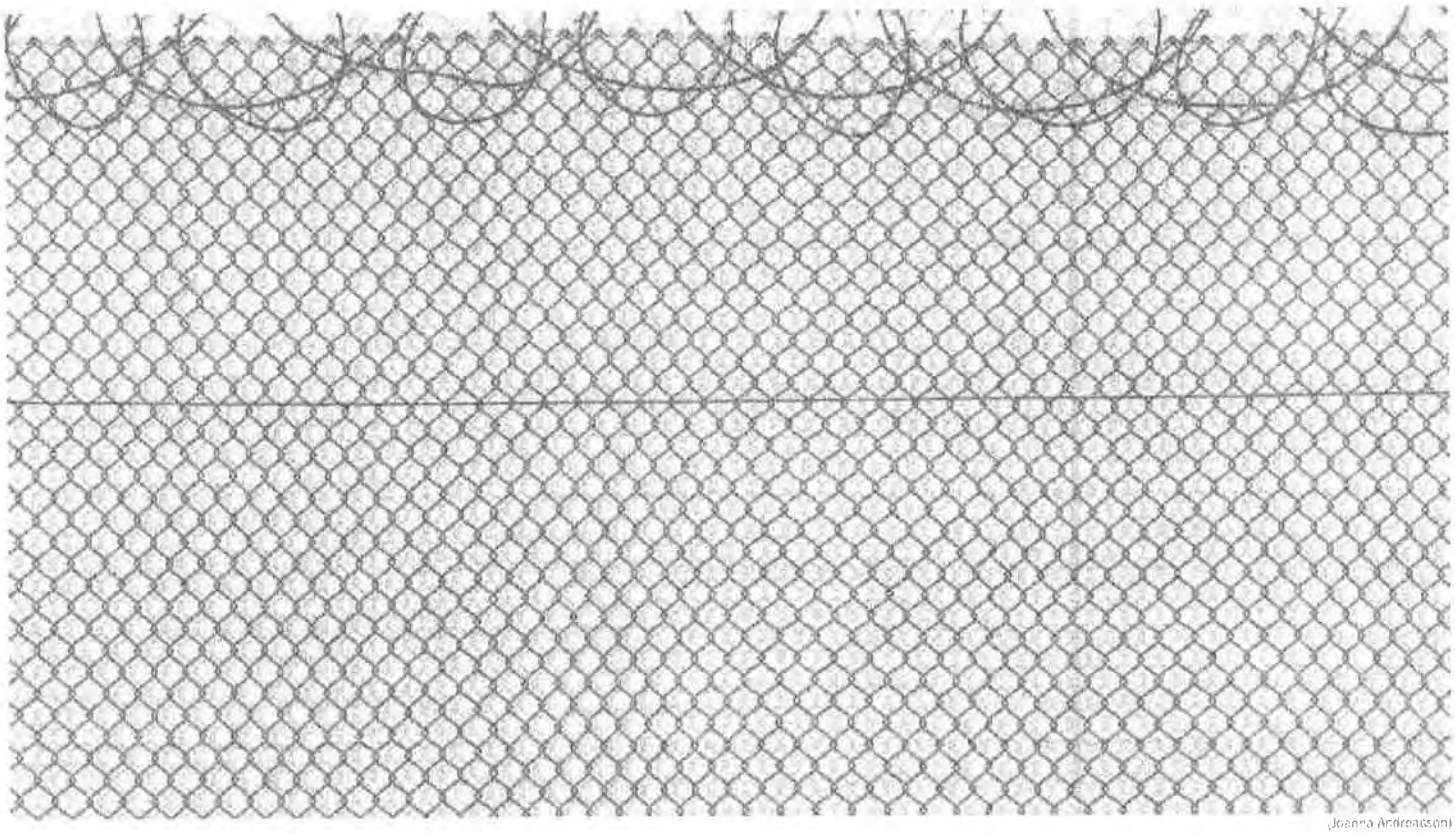
The appeals court ruled that Mr. Trump had exceeded the authority Congress had given him over immigration and had violated a part of the immigration laws barring discrimination in the issuance of visas. In a separate decision that was not directly before the justices, the United States Court of Appeals for the Fourth Circuit, in Richmond, Va., blocked the ban on a different ground, saying it violated the Constitution's prohibition of religious discrimination.

IMMIGRATION

Debate: Nations Can and Should Control Their Borders

Is it right to limit immigration?

JONATHAN H. ADLER AND SHIKHA DALMIA | 8.23.2018 12:01 AM



Joanna Andreasson

AFFIRMATIVE:

Limiting Who Enters Is a Legitimate Function of the Sovereign State

Jonathan H. Adler

Many people are understandably objecting to the Trump administration's immigration policies. Enforcement of the law has been intrusive, arbitrary, and callous. The economic case for a more liberal immigration regime is strong and more generous policies could benefit U.S. citizens and immigrants alike.

Joanna Andreasson

But some go further than that, suggesting that the only immigration policy consistent with individual freedom is one of open borders. These people, who often identify as libertarians, even believe that it is inherently illegitimate for the government of a free society to impose any limit on immigration.

This is an error.

Like any other government power, limits on migration may be misused or abused. But just because specific immigration policies are unwise does not mean that the entire enterprise of policing borders is illegitimate.

It has long been understood that a fundamental aspect of national sovereignty is control over a nation's territory, including control over the border. To say that a nation is sovereign is to say that the government is responsible for the territory over which it exercises its sovereignty. This means it has

say that a nation is sovereign is to say that the government is responsible for the territory over which it exercises its sovereignty. This means it has valid authority to exclude outsiders.

As Emer de Vattel, one of the most important natural law theorists of the 18th century and a profound influence on America's founders, explained in *The Law of Nations*, "the sovereign may forbid the entrance of his territory to foreigners in general, or in particular cases, or to certain person, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the right of domain and sovereignty." Among other reasons for this, once the sovereign admits foreigners into its territory, "he engages to protect them as his own subjects, and to afford them perfect security."

State sovereignty in relation to outsiders may be analogized to property ownership. Most libertarians readily accept that it is reasonable and legitimate for people to deny or limit use of their stuff. This is true whether that stuff is owned individually or collectively. Condominiums, cooperatives, corporations, and the like are forms of collective ownership through which the owners authorize managers to, among other things, constrain the use of the collectively owned property. Accordingly, my homeowners association can prevent nonresidents from using our ponds and traversing our conservation lands, just as it may impose limits upon how association members make use of these common resources.

Like it or not, much of the land, air, and water in this country is collectively owned. These areas are vast, politically managed commons. The use and depletion of our common resources can harm—and, indeed, violate the rights of—individuals within the broader community. Because the resources and spaces are common, none of us may exercise self-help the way we might with our own property. Instead, we are forced to rely upon the collective management that is provided by the state. Not only is power over the border an inherent aspect of national sovereignty, control of access to common resources necessarily requires controlling entry, and that will sometimes justify placing limits on immigration.

Many things done by the state to manage and protect common resources and spaces are unwise, foolish, counterproductive, or problematic in other ways. But there is nothing inherently illegitimate about the state taking actions to, for instance, ensure that our public roads are safe and our

watersheds are clean so as to avoid poisoning someone's person or property by transmission through common mediums. And this is true even though many of us will have different ideas about how clean the air or water should be, how "safe" or uncongested the roads should be, and so on.

Immigrants aren't simply teleported into Galt's Gulch, where they remain for the rest of their lives. Entering the country involves crossing a border, which demarcates the boundaries of the state's inherent defense obligations. The state has the legitimate authority to protect "our stuff" and "our spaces" from outsiders, just as I have a right to protect "my stuff," even when I do so for reasons beyond my material self-interest or self-preservation.

Collective management of common spaces may be less than ideal. Much of my own scholarship explores how and why to allow private and nongovernmental ownership of ecological resources. Yet in the absence of such reforms, collective management is necessary and legitimate.

To say that it is legitimate for the government to impose limits on immigration is not to say that any and all such limits are justified. Valid state powers may be misused or abused.

Take national defense. Few would deny that this is a legitimate function of the government. Yet to admit the legitimacy of national defense is not to endorse any and all defense policies. Many are unwise and even oppressive, but that is a problem of the specific policies, not a problem with the entire endeavor.

Likewise, in thinking about immigration, it is important to differentiate the question of whether the state *may* limit entry into the country from the separate question of the extent to which the state *should* pursue that interest (and the question what means of doing so are just and proportional).

Some argue that limits on immigration infringe upon the associational rights of citizens. Not really. I have the right to associate with those who will associate with me. I don't have the right to impose those associational preferences on others or make them bear the costs of that choice. In a wholly privatized world, it might be sufficient to let the owners of each space determine who does or does not enter, but that is not the world we inhabit.

If I refuse to let someone onto my property, I might be a jerk, but I have not violated anyone's rights. The same is true when the state prohibits entry into the nation or restricts egress through common spaces under the state's control. While I want the United States to be an open and welcoming place and a refuge for oppressed people from other lands, that doesn't mean aliens have a "right" to come here.

There are many powerful arguments to be made against current immigration policy, and many have been made in *Reason*'s pages. Among other things, the system is economically wasteful and inhumane. By all means, libertarians should criticize current law and the ways in which it is being enforced. What they should not do is argue that immigration is no concern of the state.

NEGATIVE:
Let's Err on the Side of a Presumption of Liberty in Our Immigration Policies

Shikha Dalmia

Jonathan Adler is among the country's sharpest legal minds—but unfortunately his understanding of what open borders means is flawed and, therefore, his critique is flawed too.

Adler says that "open borders" libertarians believe that it is "inherently illegitimate" for the government of a free society to impose "any" limits on immigration. But the most thoughtful open border theoreticians don't say the government may never place limits on any foreigner. Rather, we argue that in a liberal polity that is serious about protecting individual freedom, the government's powers to limit immigration should be severely constrained, just as they are when it comes to speech, gun ownership, and the other liberties.

Take speech: Even ardent First Amendment absolutists don't dispute that the government can sometimes impose viewpoint-neutral time, place, and manner restrictions. They would, however, demand that anytime the government engages in content-based restrictions, it demonstrate a "compelling state interest" and submit to strict scrutiny. They would oppose the use of mere "community standards" to censor obscene or hurtful speech. They sure as hell wouldn't accept the government banning speech for national security reasons without meeting a very high bar.

Open border libertarians advocate something analogous. They believe that there should be a presumption for liberty built into a nation's immigration laws if it wants to stay (classically) liberal. The default condition should not be a blanket ban on entry that is relaxed for this or that category—low-skilled, high-skilled, family-based, diversity visas—in response to some political whim. The default should be openness. If the government can show a "compelling" interest to keep some particular person out—because she or he poses a national security, law and order, or a public health threat—fine, it can close the border to that individual. Not otherwise.

This is essentially what University of Colorado's Michael Huemer, one of the boldest libertarian open border theorists and author of *The Problem of Political Authority*, proposes. He claims that immigrants have a *prima facie* right to be free from coercive state harm—but it's not like this right can never be overridden. "Harmful coercion is not *always* wrong," he notes. "In positing only a 'prima facie' right, I leave it open that the right may in some cases be outweighed or otherwise defeated by competing moral considerations."

In the classical liberal understanding, the state has "powers" and individuals have "rights" that constrain these powers. It's not very libertarian to frame an issue in terms of the sovereign's "right" to control the borders.

Such a starting point must inevitably end in illiberalism. Why? As the London School of Economics political theorist Chandran Kukathas argues in his forthcoming book, *Immigration and Freedom* (Princeton University Press), given that people have a natural desire to travel, explore, barter, love, and marry across artificial squiggle lines on a map, the state cannot control "outsiders" without also controlling "insiders." Indeed, if literally no one in a country wanted immigrants, newcomers couldn't survive and wouldn't come. "Yet the propensity to truck and barter and to collaborate in various… ways is a deep feature of our nature, and foreigners will rarely find themselves welcome nowhere," Kukathas notes. Hence, as the Trump administration's crackdown on immigrants reaches unprecedented levels of cruelty, his crackdown on domestic employers, sanctuary cities, and humanitarian outfits, ramps up as well.

Yes, condo owners have a right to restrict entry to their gated communities. But unlike my homeowners association, the state has a monopoly on coercive force. At condo meetings, when majorities override the interests of individual owners in the name of some common good, the owners can leave and form another association. But the state governs everyone. There is no escaping its tentacles short of quitting the country—and a state with sweeping powers can restrict that, too. If it's not "inherently illegitimate" for a government to limit the number of people coming into a country to prevent congestion and pollution, why is it not also "inherently illegitimate" for it to prevent, say, rich citizens from leaving because it needs their taxes to improve the country's common spaces?

If a state has the same powers that homeowners and condo boards have over their property, couldn't it also suppress speech and religion that it believes are antithetical to the common good? Adler's rationale for the right to limit immigration—overstraining the commons—would also apply to children. Should the government have the power to control fertility rates? How about foreign goods—should the government have unconstrained powers to restrict trade? Imports are transported on publicly funded roads and could end up using scarce landfill space, after all. Adler ignores that the state is a fundamentally different animal from a condo association and to give it the same powers is to give up on a government with enumerated and limited powers.

Adler denies that restricting the right to entry of immigrants violates the rights of citizens, but his own condo association analogy shows otherwise. Citizens, in his scheme, are co-owners of the condo's common spaces and sole owners of their homes and businesses. Yet if the government could control their guest list, wouldn't it be a violation of their property and associational rights?

At best, one can say that the rights of those who don't want foreigners here and those who do are in tension. Even then, however, the tension isn't equal. Under an open border default, those who oppose immigration still have control over their private property. Don't like foreigners? Don't invite them to your home. But when laws keep foreigners out, the only remedy for those who have personal or economic relationships with people born elsewhere is to move to where their loved ones and workers are. They even lose control over their alleged private property.

Libertarian restrictionists think that forcing natives to cough up taxes for the public schooling of immigrants is "forced integration" that violates free association (as if immigrants don't pay taxes!). But again, that logic would apply not just to people entering the country from abroad but also those entering from the womb. The taxation argument can in fact be used to justify a limitless government that controls one's fellow citizens' every move. It turns the libertarian project on its head by becoming a justification for a leviathan.

Even in a mixed economy with an incomplete articulation of property rights, such hyper-protectiveness is antithetical to the fundamental live-and-let-live ethos of libertarianism. A liberal immigration regime is good policy, yes. But it is also good on principle.

NEXT: **Debate: Libertarianism Is About More Than the State**

JONATHAN H. ADLER (@jadler1969) is the Johan Verheij Memorial Professor of Law at the Case Western Reserve University School of Law.
SHIKHA DALMIA was a senior analyst at Reason Foundation.

IMMIGRATION BORDERS

140 S.Ct. 1891
Supreme Court of the United States.

DEPARTMENT OF HOMELAND SECURITY, et al., Petitioners
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.;
Donald J. Trump, President of the United States, et al., Petitioners
National Association for the Advancement of Colored People, et al.; and
Chad Wolf, Acting Secretary of Homeland Security, et al., Petitioners
v.
Martin Jonathan Batalla Vidal, et al.

No. 18-587, No. 18-588, No. 18-589
|
Argued November 12, 2019
|
Decided June 18, 2020

Synopsis

Background: In first case, states, state university, county, city, union, and individuals brought action for declaratory and injunctive relief against Department of Homeland Security (DHS) and federal officials, challenging on constitutional grounds, and under the Administrative Procedure Act (APA), the rescission of Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children. The United States District Court for the Northern District of California, William H. Alsup, J., 279 F.Supp.3d 1011, entered preliminary injunction requiring DHS to adjudicate renewal applications for existing DACA recipients and, 298 F.Supp.3d 1304, partially granted government's motion to dismiss for failure to state a claim. Parties appealed. The United States Court of Appeals for the Ninth Circuit, Wardlaw, Circuit Judge, 908 F.3d 476, affirmed. In second case, similar claims were brought by a civil rights organization and individuals. The United States District Court for the District of Columbia, John D. Bates, J., 298 F.Supp.3d 209, granted in part and denied in part plaintiffs' motion for partial summary judgment and defendants' motion to dismiss, and vacated the rescission, and later denied reconsideration, 315 F.Supp.3d 457, but granted in part a stay of the vacatur pending appeal, 321 F.Supp.3d 143. In third case, similar claims were brought by states, individuals, and nonprofit organization. The United States District Court for the Eastern District of New York, Nicholas G. Garaufis, J., 279 F.Supp.3d 401, granted preliminary injunction, and

granted in part and denied in part defendants' motions to dismiss, 291 F.Supp.3d 260 and 295 F.Supp.3d 127. Certiorari was granted in first case, and certiorari before judgment was granted in second and third cases.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] rescission of DACA program was arbitrary and capricious, and

[2] plaintiffs failed to state a claim for an equal protection violation.

Judgment in first case vacated in part and reversed in part; judgment in second case affirmed; orders in third case affirmed in part, reversed in part, and vacated in part; all cases remanded.

Justice Sotomayor filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part.

Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Alito and Gorsuch joined.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part.

Justice Kavanaugh filed an opinion concurring in the judgment in part and dissenting in part.

West Headnotes (25)

[1] Administrative Law and Procedure ⇨ Statutory basis and limitation
Administrative Law and Procedure ⇨ Nature and Form of Remedy

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(A) In General
15Ak1114 Procedure in General
15Ak1116 Statutory basis and limitation
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(A) In General
15Ak1606 Nature and Form of Remedy
15Ak1607 In general

The Administrative Procedure Act (APA) sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts. 5 U.S.C.A. § 551 et seq.

9 Cases that cite this headnote

[2] **Administrative Law and Procedure** Report or opinion; reasons for decision

Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(D) Adjudications
15AIII(D)6 Decision
15Ak1453 Report or opinion; reasons for decision
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(G) Review
15AIV(G)3 Scope and Extent of Review in General
15Ak1743 Review for arbitrary, capricious, unreasonable, or illegal actions in general

The Administrative Procedure Act (APA) requires agencies to engage in reasoned decisionmaking and directs that agency actions be set aside if they are arbitrary or capricious. 5 U.S.C.A. § 706(2)(A).

16 Cases that cite this headnote

[3] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Review for correctness or error

Administrative Law and Procedure Wisdom, judgment, or opinion in general

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(G) Review
15AIV(G)3 Scope and Extent of Review in General
15Ak1743 Review for arbitrary, capricious, unreasonable, or illegal actions in general
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(G) Review
15AIV(G)3 Scope and Extent of Review in General
15Ak1748 Review for correctness or error
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(G) Review
15AIV(G)3 Scope and Extent of Review in General
15Ak1749 Wisdom, judgment, or opinion in general

Under the Administrative Procedure Act's (APA) narrow standard of review for determining whether agency actions are arbitrary or capricious, a court is not to substitute its judgment for that of the agency, and a court assesses only whether the action was based on a consideration of the relevant factors and whether there has been a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

19 Cases that cite this headnote

[4] **Administrative Law and Procedure** Presumptions as to Reviewability

Administrative Law and Procedure Rebuttal of presumptions

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(C) Reviewability
15Ak1654 Presumptions as to Reviewability
15Ak1655 In general
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(C) Reviewability
15Ak1654 Presumptions as to Reviewability
15Ak1656 Rebuttal of presumptions

The Administrative Procedure Act (APA) establishes a basic presumption of judicial review for one suffering a legal wrong because of agency action, but the presumption can be rebutted by a showing that a relevant statute precludes judicial review or that the agency action is committed to agency discretion by law. 5 U.S.C.A. §§ 701(a)(1, 2), 702.

10 Cases that cite this headnote

[5] **Administrative Law and Procedure** Presumptions as to Reviewability

Administrative Law and Procedure Actions Committed to Agency Discretion in General

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(C) Reviewability
15Ak1654 Presumptions as to Reviewability
15Ak1655 In general
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(C) Reviewability
15Ak1662 Nature, Scope, or Effect of Agency Action
15Ak1664 Actions Committed to Agency Discretion in General
15Ak1664(1) In general

To honor the Administrative Procedure Act's (APA) presumption of judicial review of agency action, the APA's exception to judicial review for agency action that is committed

to agency discretion by law is read quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion. 5 U.S.C.A. §§ 701(a)(2), 702.

12 Cases that cite this headnote

[6] Administrative Law and Procedure Particular Agency Actions or Failures to Act

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(C) Reviewability
15Ak1662 Nature, Scope, or Effect of Agency Action
15Ak1666 Particular Agency Actions or Failures to Act
15Ak1666(1) In general

The limited category of agency actions that are not subject to judicial review under the Administrative Procedure Act (APA), because they are committed to agency discretion by law includes an agency's decision not to institute enforcement proceedings. 5 U.S.C.A. § 701(a)(2).

5 Cases that cite this headnote

[7] Aliens, Immigration, and Citizenship Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship
24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k155 Proceedings for adoption and review

Memorandum from Department of Homeland Security (DHS), announcing Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children, did not involve a non-enforcement policy traditionally left to agency discretion, as would provide exception to Administrative Procedure Act's (APA) presumption of judicial review of agency actions, with respect to subsequent administrative action by DHS rescinding the program; memorandum created program for conferring affirmative immigration relief, which involved soliciting applications from eligible aliens, instituting a standardized review process, and sending formal notices indicating whether an alien would receive forbearance from removal, such proceedings were effectively adjudications, and resulting decisions to grant deferred action were affirmative acts of approval rather than refusals to act. 5 U.S.C.A. §§ 701(a)(2), 702; 8 C.F.R. § 274a.12(c)(14).

6 Cases that cite this headnote

[8] Aliens, Immigration, and Citizenship Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship

24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k155 Proceedings for adoption and review

INA provision, barring judicial review of claims arising from actions or proceedings brought to remove an alien, did not present a jurisdictional bar to judicial review of decision by Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children; suits seeking injunctive relief with respect to rescission of the program did not challenge any removal proceedings. Immigration and Nationality Act § 242(b)(9), 8 U.S.C.A. § 1252(b)(9).

1 Cases that cite this headnote

[9] Aliens, Immigration, and Citizenship Decisions reviewable

24 Aliens, Immigration, and Citizenship
24V Denial of Admission and Removal
24V(G) Judicial Review or Intervention
24k392 Decisions reviewable

INA provision, barring judicial review of claims arising from actions or proceedings brought to remove an alien, does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, or the decision to seek removal, or the process by which removability will be determined. Immigration and Nationality Act § 242(b)(9), 8 U.S.C.A. § 1252(b)(9).

11 Cases that cite this headnote

[10] Aliens, Immigration, and Citizenship Jurisdiction and venue

Aliens, Immigration, and Citizenship Decisions reviewable

24 Aliens, Immigration, and Citizenship
24V Denial of Admission and Removal
24V(G) Judicial Review or Intervention
24k385 Jurisdiction and venue
24 Aliens, Immigration, and Citizenship
24V Denial of Admission and Removal
24V(G) Judicial Review or Intervention
24k392 Decisions reviewable

INA provision, limiting judicial review of cases arising from decisions to commence removal proceedings, adjudicate removal cases, or execute removal orders, does not cover all claims arising from removal proceedings or impose a general jurisdictional limitation. Immigration and Nationality Act § 242(g), 8 U.S.C.A. § 1252(g).

15 Cases that cite this headnote

[11] **Aliens, Immigration, and Citizenship** Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship
24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k155 Proceedings for adoption and review

INA provision, limiting judicial review of cases arising from decisions to commence removal proceedings, adjudicate removal cases, or execute removal orders, did not present a jurisdictional bar to judicial review of decision by Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided protections from removal for certain unauthorized aliens who had entered United States as children; the rescission was not a decision to commence removal proceedings, or to adjudicate a case, or to execute a removal order. Immigration and Nationality Act § 242(g), 8 U.S.C.A. § 1252(g).

16 Cases that cite this headnote

[12] **Administrative Law and Procedure** Timing of theory and grounds asserted

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(I) Theory and Grounds of Decision on Review
15Ak1935 Timing of theory and grounds asserted

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.

24 Cases that cite this headnote

[13] **Administrative Law and Procedure** Particular Errors and Defects Warranting Remand

Administrative Law and Procedure Making or supplementing reasons for decision

Administrative Law and Procedure Conducting Proceedings or Further Proceedings

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2018 Remand
15Ak2020 Particular Errors and Defects Warranting Remand
15Ak2020(1) In general
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2021 Directions on Remand
15Ak2025 Making or supplementing reasons for decision
15A Administrative Law and Procedure

15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2021 Directions on Remand
15Ak2026 Conducting Proceedings or Further Proceedings
15Ak2026(1) In general

If the grounds that the agency invoked when it took the action are inadequate, a court may remand for the agency to do one of two things: first, the agency can offer a fuller explanation of the agency's reasoning at the time of the agency action, and second, the agency can deal with the problem afresh by taking new agency action.

9 Cases that cite this headnote

[14] Administrative Law and Procedure Course and conduct of further administrative proceedings

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2027 Further Administrative Proceedings
15Ak2031 Course and conduct of further administrative proceedings

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency's initial explanation indicates the determinative reason or reasons for the final action taken, the agency may elaborate later on those reasons, but may not provide new ones.

10 Cases that cite this headnote

[15] Administrative Law and Procedure Course and conduct of further administrative proceedings

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2027 Further Administrative Proceedings
15Ak2031 Course and conduct of further administrative proceedings

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency chooses to deal with the problem afresh by taking new agency action, the agency is not limited to its prior reasons, but must comply with the procedural requirements for new agency action.

27 Cases that cite this headnote

[16] Administrative Law and Procedure Further judicial review; subsequent review

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review

15AIV(N) Determination and Disposition
15Ak2033 Further judicial review; subsequent review

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, and the agency chooses to provide a fuller explanation of the agency's reasoning at the time of the agency action, the fuller explanation must be viewed critically to ensure that the action is not upheld by the court on the basis of impermissible post hoc rationalization.

16 Cases that cite this headnote

[17] Aliens, Immigration, and Citizenship ⇐ Proceedings for adoption and review

24 Aliens, Immigration, and Citizenship
24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k155 Proceedings for adoption and review

Secretary of Department of Homeland Security (DHS), having chosen, on remand from the court, to provide a fuller explanation for initial decision of DHS to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children, engaged in impermissible post hoc rationalizations, which were not properly before the court on judicial review after remand; rescission decision had rested solely on conclusion that DACA program was unlawful, but Secretary offered what she characterized as three separate and independently sufficient reasons for rescission, only one of which was the conclusion that DACA program was illegal.

1 Cases that cite this headnote

[18] Administrative Law and Procedure ⇐ Timing of theory and grounds asserted

Administrative Law and Procedure ⇐ Further judicial review; subsequent review

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(I) Theory and Grounds of Decision on Review
15Ak1935 Timing of theory and grounds asserted
15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(N) Determination and Disposition
15Ak2033 Further judicial review; subsequent review

When a court remands to an agency because the grounds that the agency invoked when it took the action are inadequate, the rule requiring a new decision from the agency, before a court can consider new reasons, promotes agency accountability by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of

authority and instills confidence that the reasons given are not simply convenient litigating positions; in contrast, permitting agencies to invoke belated justifications can upset the orderly functioning of the judicial review process, forcing both litigants and courts to chase a moving target.

9 Cases that cite this headnote

[19] Administrative Law and Procedure Timing of theory and grounds asserted

15A Administrative Law and Procedure
15AIV Judicial Remedies and Review
15AIV(l) Theory and Grounds of Decision on Review
15Ak1935 Timing of theory and grounds asserted

The functional reasons for requiring contemporaneous explanations for agency action apply with equal force regardless whether improper post hoc justifications are raised in court by those appearing on behalf of the agency, or by agency officials themselves.

4 Cases that cite this headnote

[20] Aliens, Immigration, and Citizenship Validity

24 Aliens, Immigration, and Citizenship
24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k154 Validity

Acting Secretary of Department of Homeland Security (DHS) acted arbitrarily and capriciously in deciding to rescind the Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children, where important aspects of the problem were not considered; while Acting Secretary recognized that a Court of Appeals decision called into question the legality of DACA program's work authorization and benefits eligibility, she did not address the forbearance policy at heart of DACA and did not recognize her discretion to remove benefits eligibility and work authorization while continuing forbearance, and Acting Secretary did not address whether there was legitimate reliance on DACA program.

5 U.S.C.A. § 706(2)(A).

[21] Administrative Law and Procedure Requirements in General

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(C) Rules, Regulations, and Other Policymaking
15AIII(C)6 Amendment, Repeal, Expiration, or Change of Policy
15Ak1283 Requirements in General

15Ak1284 In general

When an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.

5 Cases that cite this headnote

[22] Administrative Law and Procedure ⇐ Change of policy; reason or explanation

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(C) Rules, Regulations, and Other Policymaking
15AIII(C)6 Amendment, Repeal, Expiration, or Change of Policy
15Ak1287 Change of policy; reason or explanation

When an agency changes course, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account, and it would be arbitrary and capricious to ignore such matters.

6 Cases that cite this headnote

[23] Aliens, Immigration, and Citizenship ⇐ Validity

Constitutional Law ⇐ Discrimination Between Classes of Aliens

24 Aliens, Immigration, and Citizenship
24III Immigration Agencies and Officers
24k152 Rules and Regulations
24k154 Validity
92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)2 Aliens
92k3111 Immigration and Naturalization
92k3113 Discrimination Between Classes of Aliens
92k3113(1) In general

Assuming that equal protection claim by aliens, alleging that the Executive, motivated by animus, ended a program that disproportionately benefited certain ethnic groups, was cognizable, aliens failed to plausibly allege that an invidious discriminatory purpose was a motivating factor in decision to rescind Deferred Action for Childhood Arrivals (DACA) program, which provided work authorization and eligibility for various federal benefits, as well as protections from removal, for certain unauthorized aliens who had entered the United States as children; even if Latinos from Mexico represented 78% of DACA recipients, Latinos made up a large share of unauthorized alien population, history leading up to rescission was not irregular, and President's statements allegedly criticizing Latinos were remote in time and were made in unrelated contexts. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

8 Cases that cite this headnote

[24] Constitutional Law 🔑 Intentional or purposeful action requirement

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3040 Intentional or purposeful action requirement

To plead animus, a plaintiff asserting an equal protection claim must raise a plausible inference that an invidious discriminatory purpose was a motivating factor in the relevant decision. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

6 Cases that cite this headnote

[25] Constitutional Law 🔑 Intentional or purposeful action requirement

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3040 Intentional or purposeful action requirement

Possible evidence of discriminatory animus, in an action asserting an equal protection claim, includes disparate impact on a particular group, departures from the normal procedural sequence, and contemporary statements by members of the decisionmaking body. (Per Chief Justice Roberts, with three justices concurring and four justices concurring in the judgment.) U.S. Const. Amend. 5.

5 Cases that cite this headnote

***1896** *Syllabus*[*]

In 2012, the Department of Homeland Security (DHS) issued a memorandum announcing an immigration relief program known as Deferred Action for Childhood Arrivals (DACA), which allows certain unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Those granted such relief become eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Two years later, DHS expanded DACA eligibility and created a related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). If implemented, that program would have made 4.3 million parents of U.S. citizens or lawful permanent residents eligible for the same forbearance from removal, work eligibility, and other benefits as DACA recipients. Texas, joined by 25 other States, secured a nationwide preliminary injunction barring implementation of both the DACA expansion and DAPA. The Fifth Circuit upheld the injunction, concluding that the program violated the Immigration and Nationality Act (INA), which carefully defines eligibility for benefits. This Court affirmed by an equally divided vote, and the litigation then continued in the District Court.

In June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum, citing, among other reasons, the ongoing suit by Texas and new policy priorities. That September, the Attorney General advised Acting Secretary of Homeland Security Elaine C. Duke that DACA shared DAPA's legal flaws and should also be rescinded. The next day, Duke acted on that advice. Taking into consideration the Fifth Circuit and Supreme Court rulings and the Attorney General's letter, Duke decided to terminate the program. She explained that DHS would no longer accept new applications, but that existing DACA recipients whose benefits were set to expire within six months could apply for a two-year renewal. For all other DACA recipients, previously issued grants of relief would expire on their own terms, with no prospect for renewal.

Several groups of plaintiffs challenged Duke's decision to rescind DACA, claiming that it was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. District Courts in California (*Regents*, No. 18–587), New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588) all ruled for the plaintiffs. Each court rejected the Government's arguments that the claims were unreviewable under the APA and that the INA deprived the courts of jurisdiction. In *Regents* and *Batalla Vidal*, the District Courts further held that the equal protection claims were adequately alleged, and they entered coextensive nationwide preliminary injunctions based on the conclusion that the plaintiffs were likely to succeed on their APA claims. The District Court in *NAACP* took a different approach. It deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, finding that the rescission was inadequately explained. The court then stayed its order for 90 days to permit DHS to reissue a memorandum rescinding DACA, this time with a fuller explanation of the conclusion that DACA was unlawful. Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded to the court's order. She declined to disturb or replace Duke's rescission decision and instead explained why she thought her predecessor's decision was sound. In addition to reiterating the illegality conclusion, she offered several new justifications for the rescission. The Government moved for the District Court to reconsider in light of this additional explanation,

but the court concluded that the new reasoning failed to elaborate meaningfully on the illegality rationale.

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. While those appeals were pending, the Government filed three petitions for certiorari before judgment. Following the Ninth Circuit affirmance in *Regents*, this Court granted certiorari.

Held: The judgment in No. 18–587 is vacated in part and reversed in part; the judgment in No. 18–588 is affirmed; the February 13, 2018 order in No. 18–589 is vacated, the November 9, 2017 order is affirmed in part, and the March 29, 2018 order is reversed in part; and all of the cases are remanded.

908 F. 3d 476, vacated in part and reversed in part; No. 18–588, affirmed; and No. 18–589, February 13, 2018 order vacated, November 9, 2017 order affirmed in part, and March 29, 2018 order reversed in part; all cases remanded.

THE CHIEF JUSTICE delivered the opinion of the Court, except as to Part IV, concluding:

1. DHS's rescission decision is reviewable under the APA and is within this Court's jurisdiction. Pp. 1905 – 1908.

(a) The APA's "basic presumption of judicial review" of agency action, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681, can be rebutted by showing that the "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). In *Heckler* v. *Chaney*, the Court held that this narrow exception includes an agency's decision not to institute an enforcement action. 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714. The Government contends that DACA is a general non-enforcement policy equivalent to the individual non-enforcement decision in *Chaney*. But the DACA Memorandum did not merely decline to institute enforcement proceedings; it created a program for conferring affirmative immigration relief. Therefore, unlike the non-enforcement decision in *Chaney*, DACA's creation—and its rescission—is an "action [that] provides a focus for judicial review." *Id.*, at 832, 105 S.Ct. 1649. In addition, by virtue of receiving deferred action, 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Access to such benefits is an interest "courts often are called upon to protect." *Ibid.* DACA's rescission is thus subject to review under the APA. Pp. 1905 – 1907.

(b) The two jurisdictional provisions of the INA invoked by the Government do not apply. Title 8 U.S.C. § 1252(b)(9), which bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien," is inapplicable where, as here, the parties do not challenge any removal proceedings. And the rescission is not a decision "to commence proceedings, adjudicate cases, or execute removal orders" within the meaning of § 1252(g). Pp. 1906 – 1908.

2. DHS's decision to rescind DACA was arbitrary and capricious under the APA. Pp. 1907 – 1915.

(a) In assessing the rescission, the Government urges the Court to consider not just the contemporaneous explanation offered by Acting Secretary Duke but also the additional reasons supplied by Secretary Nielsen nine months later. Judicial review of agency action, however, is limited to "the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758, 135 S.Ct. 2699, 192 L.Ed.2d 674. If those grounds are inadequate, a court may remand for the agency to offer "a fuller explanation of the agency's reasoning *at the time of the agency action*," *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (emphasis added), or to "deal with the problem afresh" by taking *new* agency action, *SEC v. Chenery Corp.*, 332 U.S. 194, 201, 67 S.Ct. 1760, 91 L.Ed. 1995. Because Secretary Nielsen chose not to take new action, she was limited to elaborating on the agency's original reasons. But her reasoning bears little relationship to that of her predecessor and consists primarily of impermissible "*post hoc* rationalization." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136. The rule requiring a new decision before considering new reasons is not merely a formality. It serves important administrative law values by promoting agency accountability to the public, instilling confidence that the reasons given are not simply convenient litigating positions, and facilitating orderly review. Each of these values would be markedly undermined if this Court allowed DHS to rely on reasons offered nine months after the rescission and after three different courts had identified flaws in the original explanation. Pp. 1907 – 1910.

(b) Acting Secretary Duke's rescission memorandum failed to consider important aspects of the problem before the agency. Although Duke was bound by the Attorney General's determination that DACA is illegal, see 8 U.S.C. § 1103(a)(1), deciding how best to address that determination involved important policy choices reserved for DHS. Acting Secretary Duke plainly exercised such discretionary authority in winding down the program, but she did not appreciate the full scope of her discretion. The Attorney General concluded that the legal defects in DACA mirrored those that the courts had recognized in DAPA. The Fifth Circuit, the highest court to offer a reasoned opinion on DAPA's legality, found that DAPA violated the INA because it extended eligibility for benefits to a class of unauthorized aliens. But the defining feature of DAPA (and DACA) is DHS's decision to defer removal, and the Fifth Circuit carefully distinguished that forbearance component from the associated benefits eligibility. Eliminating benefits eligibility while continuing forbearance

thus remained squarely within Duke's discretion. Yet, rather than addressing forbearance in her decision, Duke treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. That reasoning repeated the error in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm*—treating a rationale that applied to only part of a policy as sufficient to rescind the entire policy. 463 U.S. 29, 51, 103 S.Ct. 2856, 77 L.Ed.2d 443. While DHS was not required to "consider all policy alternatives," *ibid.*, deferred action was "within the ambit of the existing" policy, *ibid.*; indeed, it was the centerpiece of the policy. In failing to consider the option to retain deferred action, Duke "failed to supply the requisite 'reasoned analysis.' " *Id.*, at 57, 103 S.Ct. 2856.

That omission alone renders Duke's decision arbitrary and capricious, but it was not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25. Certain features of the DACA policy may affect the strength of any reliance interests, but those features are for the agency to consider in the first instance. DHS has flexibility in addressing any reliance interests and could have considered various accommodations. While the agency was not required to pursue these accommodations, it was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns. Its failure to do so was arbitrary and capricious. Pp. 1909 – 1915.

THE CHIEF JUSTICE, joined by Justice GINSBURG, Justice Breyer, and Justice KAGAN, concluded in Part IV that respondents' claims fail to establish a plausible inference that the rescission was motivated by animus in violation of the equal protection guarantee of the Fifth Amendment. Pp. 1915 – 1916.

ROBERTS, C.J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV. SOTOMAYOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ALITO and GORSUCH, JJ., joined. ALITO, J., and KAVANAUGH, J., filed opinions concurring in the judgment in part and dissenting in part.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Attorneys and Law Firms

Noel J. Francisco, Solicitor General, Department of Justice, Washington, DC, for Petitioners.

Noel J. Francisco, Solicitor General, Joseph H. Hunt, Assistant Attorney, General, Jeffrey B. Wall, Deputy Solicitor General, Hashim M. Mooppan, Deputy Assistant Attorney, General, Jonathan Y. Ellis, Assistant to the Solicitor General, Mark B. Stern, Abby C. Wright, Thomas Pulham, Attorneys, Department of Justice, Washington, DC, for Petitioners.

Benjamin M. Eidelson, Cambridge, MA, Lindsay C. Harrison, Ian Heath Gershengorn, Thomas J. Perrelli, Matthew E. Price, Ishan K. Bhabha, Jenner & Block LLP, Washington, DC, for Respondents The Trustees of Princeton University, Microsoft Corporation, and Maria De La Cruz Perales Sanchez.

Joseph M. Sellers, Julie S. Selesnick, Cohen Milstein Sellers, & Toll PLLC, Washington, DC, for Respondents NAACP; American Federation of Teachers, AFL-CIO; and United Food and Commercial Workers International Union, AFL-CIO, CLC.

Bradford M. Berry, NAACP, Baltimore, MD, for Respondent NAACP.

Ramona E. Romero, Wesley Markham, Princeton, NJ, for Respondent The Trustees of Princeton University.

Cynthia L. Randall, Microsoft Corporation, Redmond, WA, for Respondent Microsoft Corporation.

David J. Strom, American Federation, of Teachers, Washington, DC, for Respondent American Federation of Teachers, AFL-CIO.

Peter J. Ford, United Food &, Commercial Workers, International Union, AFL-CIO, CLC, Washington, DC, for Respondent United Food & Commercial Workers International Union, AFL-CIO, CLC.

Xavier Becerra, Attorney General of California, Michael J. Mongan, Solicitor General, Michael L. Newman, Senior Assistant Attorney General, Samuel P. Siegel, Joshua Patashnik, Deputy Solicitors General, Shubhra Shivpuri, James F. Zahradka II, Deputy Attorneys General, San Francisco, CA, Aaron M. Frey, Attorney General of Maine, Susan P. Herman, Deputy Attorney General, Augusta, ME, Brian E. Frosh, Attorney General of Maryland, Steven M. Sullivan, Solicitor General, Leah J. Tulin, Assistant Attorney General, Baltimore, MD, Keith Ellison,

Attorney General of Minnesota, Liz Kramer, Solicitor General, Jacob Campion, Assistant Attorney General, St. Paul, MN, for Respondents.

Theodore J. Boutrous, Jr., Ethan D. Dettmer, Jonathan N. Soleimani, Gibson, Dunn & Crutcher LLP, Mark D. Rosenbaum, Judy London, Public Counsel, Los Angeles, CA, Theodore B. Olson, Stuart F. Delery, Matthew S. Rozen, Andrew J. Wilhelm, Suria M. Bahadue, Gibson, Dunn & Crutcher LLP, Washington, DC, for DACA Recipient Respondents in No. 18-587.

Erwin Chemerinsky, University of California, Berkeley School of Law, Berkeley, CA, Laurence H. Tribe, Harvard Law School, Cambridge, MA, Luis Cortes Romero, Immigrant Advocacy & Litigation, Center, PLLC, Kent, WA, Leah M. Litman, University of Michigan, Law School, Ann Arbor, MI, Michael J. Wishnie, Muneer I. Ahmad, Marisol Orihuela, Karen C. Tumlin, Cooperating Attorney, Jerome N. Frank, Legal Services Organization, New Haven, CT, Amy S. Taylor, Paige Austin, Brooklyn, NY, Trudy S. Rebert, National Immigration Law Center, Jackson Heights, NY, Araceli Martínez-Olguín, Mayra B. Joachin, National Immigration Law Center, Los Angeles, CA, Scott Foletta, Jackson Heights, NY, for DACA Recipient Respondents and, Make the Road New York in No. 18-589.

Stacey M. Leyton, Altshuler Berzon LLP, San Francisco, CA, for Respondents County of, Santa Clara and Service Employees, International Union Local 521 in, No. 18-587.

James R. Williams, Greta S. Hansen, Laura S. Trice, Marcelo Quiñones, Office Of The County Counsel, County of Santa Clara, San Jose, CA, for Respondent County of, Santa Clara in No. 18-587.

Jeffrey M. Davidson, David Watnick, Covington & Burling LLP, San Francisco, CA, Charles F. Robinson, Margaret Wu, Sonya Sanchez, University of California, Office of the General Counsel, Oakland, CA, Robert A. Long, Lanny A. Breuer, Mark H. Lynch, Alexander A. Berengaut, Megan A. Crowley, Ivano M. Ventresca, Covington & Burling LLP, Washington, DC, for The Regents of the University of California, and Janet Napolitano.

Justin T. Berger, Brian Danitz, Tamarah Prevost, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA, for City of San José.

Letitia James, Attorney General of New York, Barbara D. Underwood, Solicitor General, Anisha S. Dasgupta, Deputy Solicitor General, Andrew W. Amend, Assistant Deputy Solicitor General, David S. Frankel, Assistant Solicitor General, New York, NY, for Respondents.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part IV.

***1901** In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

A

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program for "certain young people who were brought to this country as children." App. to Pet. for Cert. in No. 18–587, p. 97a (App. to Pet. for Cert.). Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not threaten national security or public safety. *Id.*, at 98a. DHS concluded that individuals who meet these criteria warrant favorable treatment under the immigration laws because they "lacked the intent to violate the law," are "productive" contributors to our society, and "know only this country as home." *Id.*, at 98a–99a.

"[T]o prevent [these] low priority individuals from being removed from the ***1902** United States," the DACA Memorandum instructs Immigration and Customs Enforcement to "exercise prosecutorial discretion[ ] on an individual basis ... by deferring action for a period of two years, subject to renewal." *Id.*, at 100a. In addition, it directs U.S. Citizenship and Immigration Services (USCIS) to "accept applications to determine whether these individuals qualify for work authorization during this period of deferred action," *id.*, at 101a, as permitted under regulations long predating DACA's creation, see 8 CFR § 274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish "economic necessity"); 46 Fed. Reg. 25080–25081 (1981) (similar). Pursuant to other regulations, deferred action recipients are

considered "lawfully present" for purposes of, and therefore eligible to receive, Social Security and Medicare benefits. See 8 CFR § 1.3(a)(4)(vi); 42 CFR § 417.422(h) (2012).

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. App. to Pet. for Cert. 106a–107a. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U.S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients.

Before the DAPA Memorandum was implemented, 26 States, led by Texas, filed suit in the Southern District of Texas. The States contended that DAPA and the DACA expansion violated the APA's notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive's duty under the Take Care Clause of the Constitution. The District Court found that the States were likely to succeed on the merits of at least one of their claims and entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. See *Texas v. United States*, 86 F.Supp.3d 591, 677–678 (2015).

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. *Texas v. United States*, 809 F.3d 134, 188 (2015). In opposing the injunction, the Government argued that the DAPA Memorandum reflected an unreviewable exercise of the Government's enforcement discretion. The Fifth Circuit majority disagreed. It reasoned that the deferred action described in the DAPA Memorandum was "much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." *Id.*, at 166. From this, the majority concluded that the creation of the DAPA program was not an unreviewable action "committed to agency discretion by law." *Id.*, at 169 (quoting 5 U.S.C. § 701(a)(2)).

The majority then upheld the injunction on two grounds. It first concluded the States were likely to succeed on their procedural claim that the DAPA Memorandum was a substantive rule that was required to undergo notice and comment. It then held that the APA required DAPA to be set aside because the program was "manifestly contrary" to the INA, which "expressly and carefully provides legal designations allowing defined classes" to "receive the benefits" associated with "lawful presence" and to qualify for work authorization, 809 F.3d at 179–181, 186 (internal ***1903** quotation marks omitted). Judge King dissented.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote, which meant that no opinion was issued. *United States* v. *Texas*, 579 U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*per curiam*). For the next year, litigation over DAPA and the DACA expansion continued in the Southern District of Texas, while implementation of those policies remained enjoined.

Then, in June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, "advis[ing]" that DHS "should rescind" DACA as well. App. 877. Citing the Fifth Circuit's opinion and this Court's equally divided affirmance, the Attorney General concluded that DACA shared the "same legal ... defects that the courts recognized as to DAPA" and was "likely" to meet a similar fate. *Id.*, at 878. "In light of the costs and burdens" that a rescission would "impose[ ] on DHS," the Attorney General urged DHS to "consider an orderly and efficient wind-down process." *Ibid.*

The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter. App. to Pet. for Cert. 111a–117a. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated." *Id.*, at 117a.

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal. *Id.*, at 117a–118a.

B

Within days of Acting Secretary Duke's rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U.S. District Courts for the Northern District of California (*Regents*, No. 18–587), the Eastern District of New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588). The relevant claims are that the rescission was arbitrary and capricious in violation of the

APA and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause.[1]

All three District Courts ruled for the plaintiffs, albeit at different stages of the proceedings.[2] In doing so, each court rejected ***1904** the Government's threshold arguments that the claims were unreviewable under the APA and that the INA deprived the court of jurisdiction. 298 F.Supp.3d 209, 223–224, 234–235 (DDC 2018); 279 F.Supp.3d 1011, 1029–1033 (ND Cal. 2018); 295 F.Supp.3d 127, 150, 153–154 (EDNY 2017).

In *Regents* and *Batalla Vidal*, the District Courts held that the equal protection claims were adequately alleged. 298 F.Supp.3d 1304, 1315 (ND Cal. 2018); 291 F.Supp.3d 260, 279 (EDNY 2018). Those courts also entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, but did order the agency to allow DACA recipients to "renew their enrollments." 279 F.Supp.3d at 1048; see 279 F.Supp.3d 401, 437 (EDNY 2018).

In *NAACP*, the D. C. District Court took a different course. In April 2018, it deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke's "conclusory statements were insufficient to explain the change in [the agency's] view of DACA's lawfulness." 298 F.Supp.3d at 243. The District Court stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.*, at 245.

Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded via memorandum. App. to Pet. for Cert. 120a–126a. She explained that, "[h]aving considered the Duke memorandum," she "decline[d] to disturb" the rescission. *Id.*, at 121a. Secretary Nielsen went on to articulate her "understanding" of Duke's memorandum, identifying three reasons why, in Nielsen's estimation, "the decision to rescind the DACA policy was, and remains, sound." *Ibid.* First, she reiterated that, "as the Attorney General concluded, the DACA policy was contrary to law." *Id.*, at 122a. Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. *Id.*, at 123a. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. *Id.*, at 123a–

124a. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum. *Id.*, at 125a.

The Government asked the D. C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court's view, the new memorandum, which ***1905** "fail[ed] to elaborate meaningfully" on the agency's illegality rationale, still did not provide an adequate explanation for the September 2017 rescission. 315 F.Supp.3d 457, 460, 473–474 (2018).

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. In November 2018, while those appeals were pending, the Government simultaneously filed three petitions for certiorari before judgment. After the Ninth Circuit affirmed the nationwide injunction in *Regents*, see 908 F.3d 476 (2018), but before rulings from the other two Circuits, we granted the petitions and consolidated the cases for argument. 588 U.S. ——, 139 S.Ct. 2779, 204 L.Ed.2d 1156 (2019). The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

[1] **[2]** **[3]** The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). It requires agencies to engage in "reasoned decisionmaking," *Michigan* v. *EPA*, 576 U.S. 743, 750, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted), and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under this "narrow standard of review, ... a court is not to substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (internal quotation marks omitted), but instead to assess only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

A

[4] The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.' " *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (quoting § 702). That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, § 701(a)(1), or that the "agency action is committed to agency discretion by law," § 701(a)(2). The latter exception is at issue here.

[5] **[6]** To "honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly," *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U.S. ——, ——, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018), confining it to those rare "administrative decision[s] traditionally left to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993). This limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and it is on that exception that the Government primarily relies.

***1906** In *Chaney*, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA's denial of that petition was presumptively unreviewable in light of the well-established "tradition" that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion." *Id.*, at 831, 105 S.Ct. 1649. We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such as "whether the particular enforcement action requested best fits the agency's overall policies." *Ibid.* The decision also mirrors, "to some extent," a prosecutor's decision not to indict, which has "long been regarded as the special province of the Executive Branch." *Id.*, at 832, 105 S.Ct. 1649. And, as a practical matter, "when an agency refuses to act" there is no action to "provide[ ] a focus for judicial review." *Ibid.*

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in *Chaney*. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal

prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

[7] But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class. *Ibid.* Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. App. to Pet. for Cert. 100a. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively "adjudicat[ions]," *Id.*, at 117a. And the result of these adjudications—DHS's decision to "grant deferred action," Brief for Petitioners 45—is an "affirmative act of approval," the very opposite of a "refus[al] to act," *Chaney*, 470 U.S. at 831–832, 105 S.Ct. 1649. In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an "action [that] provides a focus for judicial review." *Id.*, at 832, 105 S.Ct. 1649.

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. See *supra*, at 1901. Unlike an agency's refusal to take requested enforcement action, access to these types of benefits is an interest "courts often are called upon to protect." *Chaney*, 470 U.S. at 832, 105 S.Ct. 1649. See also *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003) (reviewing ***1907** eligibility determination for Social Security benefits).

Because the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA.

B

The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies.

[8] **[9]** Section 1252(b)(9) bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien." 66 Stat. 209, as amended, 8 U.S.C. § 1252(b)(9). That targeted language is not aimed at this sort of case. As we have said before, § 1252(b)(9) "does not present a jurisdictional bar" where those bringing suit "are not asking for review of an order of removal," "the decision ... to seek removal," or "the process by which ... removability will be determined." *Jennings* v. *Rodriguez*, 583 U.S. ——, ———————, 138 S.Ct. 830, 841, 200 L.Ed.2d 122 (2018) (plurality opinion); *id.*, at ——, 138 S.Ct., at 875–876 (BREYER, J., dissenting). And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings.

[10] **[11]** Section 1252(g) is similarly narrow. That provision limits review of cases "arising from" decisions "to commence proceedings, adjudicate cases, or execute removal orders." § 1252(g). We have previously rejected as "implausible" the Government's suggestion that § 1252(g) covers "all claims arising from deportation proceedings" or imposes "a general jurisdictional limitation." *Reno v. American-Arab Anti–Discrimination Comm.*, 525 U.S. 471, 482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). The rescission, which revokes a deferred action program with associated benefits, is not a decision to "commence proceedings," much less to "adjudicate" a case or "execute" a removal order.

With these preliminary arguments out of the way, we proceed to the merits.

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D. C. District Court vacated the Duke rescission and 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." 298 F.Supp.3d at 245. According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential and policy reasons not relied upon by Duke.

[12] [13] [14] [15] 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." *Michigan*, 576 U.S. at 758, 135 S.Ct. 2699. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning *at the time of the agency action*." ***1908** *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (emphasis added). See also *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 5–6 (CADC 2006) (Garland, J.) (permitting an agency to provide an "amplified articulation" of a prior "conclusory" observation (internal quotation marks omitted)). This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (*per curiam*). Alternatively, the agency can "deal with the problem afresh" by taking *new* agency action. *SEC v. Chenery Corp.*, 332 U.S. 194, 201, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) (*Chenery II*). An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. App. to Pet. for Cert. 121a. Indeed, the Government's subsequent request for reconsideration described the Nielsen Memorandum as "additional explanation for [Duke's] decision" and asked the District Court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." Motion to Revise Order in No. 17–cv–1907 etc. (D DC), pp. 2, 19. Contrary to the position of the Government before this Court, and of Justice KAVANAUGH in dissent, *post*, at 1933 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

[16] [17] Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "*post hoc* rationalization." *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814. But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. See App. to Pet. for Cert. 117a. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, *id.*, at 122a, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally *questionable* and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points ***1909** included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

[18] The Government, echoed by Justice KAVANAUGH, protests that requiring a new decision before considering Nielsen's new justifications would be "an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766, n. 6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (plurality opinion). See also *post*, at 1934. Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," *Bowen v. American Hospital Assn.*, 476 U.S. 610, 643, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

[19] Justice KAVANAUGH asserts that this "foundational principle of administrative law," *Michigan*, 576 U.S. at 758, 135 S.Ct. 2699, actually limits only what lawyers may argue, not what agencies may do. *Post*, at 1934. While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether

post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves. See *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) ("[T]he *post hoc* rationalizations of the agency ... cannot serve as a sufficient predicate for agency action."); *Overton Park*, 401 U.S. at 419, 91 S.Ct. 814 (rejecting "litigation affidavits" from agency officials as "merely '*post hoc*' rationalizations").[3]

Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This ***1910** is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated." App. to Pet. for Cert. 117a.[4]

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke's decisionmaking authority—she was *bound* by the Attorney General's legal determination.

The same statutory provision that establishes the Secretary of Homeland Security's authority to administer and enforce immigration laws limits that authority, specifying that, with respect to "all questions of law," the determinations of the Attorney General "shall be controlling." 8 U.S.C. § 1103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did

they discuss whether the current suits challenging Duke's rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General's legal conclusion.

[20] Because of these gaps in respondents' briefing, we do not evaluate the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents' third argument—that Acting Secretary Duke "failed to consider ... important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a–118a (listing the Acting Secretary's decisions on eight transition issues). ***1911** Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. *Ibid.*

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal ... defects that the courts recognized as to DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." *Texas*, 809 F.3d at 170; see *id.*, at 148, 184. The Fifth Circuit's focus on these benefits was central to every stage of its analysis. See *id.*, at 155 (standing); *id.*, at 163 (zone of interest); *id.*, at 164 (applicability of § 1252(g)); *id.*, at 166 (reviewability); *id.*, at 176–177 (notice and comment); *id.*, at 184 (substantive APA). And the Court ultimately held that DAPA was "manifestly contrary to the INA" precisely because it "would make 4.3 million otherwise removable aliens" eligible for work authorization and public benefits. *Id.*, at 181–182 (internal quotation marks omitted).[5]

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). See App. to Pet. for Cert. 99a. And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. See *Texas*, 809 F.3d at

168, and n. 108. The other "[p]art of DAPA," the court noted, "involve[d] the Secretary's decision —at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens." *Id.*, at 166. Borrowing from this Court's prior description of deferred action, the Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.' " *Id.*, at 168 (quoting *Reno*, 525 U.S. at 484, 119 S.Ct. 936). And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." *Texas*, 809 F.3d at 166, 169. In other words, the Secretary's forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit's holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit concluded that DAPA "conflicted with the discretion authorized by Congress" because the INA " 'flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby ***1912** make them newly eligible for a host of federal and state benefits, including work authorization.' " App. to Pet. for Cert. 114a (quoting *Texas*, 809 F.3d at 184). Duke did not characterize the opinion as one about forbearance.

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. 463 U.S. at 37–38, 46, 103 S.Ct. 2856. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. *Id.*, at 38, 103 S.Ct. 2856.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of " automatic seatbelts. *Id.*, at 47, 103 S.Ct. 2856. It did "not cast doubt" on the "efficacy of airbag technology" or upon

"the need for a passive restraint standard." *Ibid.* Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement." *Id.*, at 51, 103 S.Ct. 2856.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. *Id.*, at 47, 103 S.Ct. 2856. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. *Ibid.* Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," App. to Pet. for Cert. 98a–99a, the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy, *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856.[6]

***1913** The Government acknowledges that "[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands." Reply Brief 21. It insists, however, that "DHS was not required to consider whether DACA's illegality could be addressed by separating" the two. *Ibid.* According to the Government, "It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked." *Ibid.* Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

[21] The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. *Post*, at 1929 – 1930, n. 14 (opinion of THOMAS, J). It contends, however, that we should not "dissect" agency action "piece by piece." *Post,* at 1929. The dissent instead rests on the Attorney General's legal determination—which considered only benefits—"to supply the 'reasoned analysis' " to support rescission of both benefits and forbearance. *Post,* at 1930 (quoting *State Farm*, 463 U.S. at 42, 103 S.Ct. 2856). But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the "alternative[s]" that are "within the ambit of the existing [policy]." *Id.*, at 51, 103 S.Ct. 2856. Here forbearance was not simply "within the ambit of the existing [policy]," it was the centerpiece of the policy: DACA, after all, stands for "*Deferred Action* for Childhood Arrivals." App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856.

[22] That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' " *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. ——, ——, 136 S.Ct. 2117, 2126, 195 L.Ed.2d 382 (2016) (quoting *Fox Television*, 556 U.S. at 515, 129 S.Ct. 1800). "It would be arbitrary and capricious to ignore such matters." *Id.*, at 515, 129 S.Ct. 1800. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. Reply Brief 16–17; App. to Pet. for Cert. 125a. See also *post*, at 1930 – 1931 (opinion of THOMAS, J). But 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. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to ***1914** normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18–587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See *id.*, at 41–42; Brief for Respondent State of New York et al. in No. 18–589, p. 42 (Brief for New York). See also Brief for 143 Businesses as *Amici Curiae* 17 (estimating that hiring and training replacements would cost employers $6.3 billion). In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year. *Ibid.*

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude

that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with "administrative complexities." App. to Pet. for Cert. 116a–118a. She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," *post*, at 1930 (opinion of THOMAS, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." ***1915** *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of man." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). But, because DHS was "not writing on a blank slate," *post,* at 1929, n. 14 (opinion of THOMAS, J.), it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. See *post*, at 1928 – 1930 (opinion of THOMAS, J.).

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. See *post*, at 1928. But nothing about that determination foreclosed or even

addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

Lastly, we turn to respondents' claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

[23] The parties dispute the proper framing of this claim. The Government contends that the allegation that the Executive, motivated by animus, ended a program that disproportionately benefits certain ethnic groups is a selective enforcement claim. Such a claim, the Government asserts, is barred by our decision in *Reno* v. *American-Arab Anti-Discrimination Committee*. See 525 U.S. at 488, 119 S.Ct. 936 (holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"). Respondents counter that their claim falls outside the scope of that precedent because they are not challenging individual enforcement proceedings. We need not resolve this debate because, even if the claim is cognizable, the allegations here are insufficient.

[24] **[25]** To plead animus, a plaintiff must raise a plausible inference that an "invidious discriminatory purpose was a motivating factor" in the relevant decision. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Possible evidence includes disparate impact on a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body." *Id.*, at 266–268, 97 S.Ct. 555. Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump. Brief for New York 54–55.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. See B. Baker, DHS, Office of Immigration Statistics, Population Estimates, Illegal Alien Population Residing in the United States: January 2015, Table 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. ***1916** Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that "DACA received reaffirmation by [DHS] as recently as three months before the rescission," 908 F.3d at 519 (quoting 298 F.Supp.3d at 1315), referring to the June 2017 DAPA rescission memo, which stated that DACA would "remain in effect," App. 870. But this reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA's legal defects, DHS's decision to reevaluate DACA was not a "strange about-face." 908 F.3d at 519. It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the *Batalla Vidal* court acknowledged, respondents did not "identif[y] statements by [either] that would give rise to an inference of discriminatory motive." 291 F.Supp.3d at 278. Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue. *Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.

* * *

We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." *Chenery II*, 332 U.S. at 207, 67 S.Ct. 1760. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

The judgment in *NAACP*, No. 18–588, is affirmed.[7] The judgment in *Regents*, No. 18–587, is vacated in part and reversed in part. And in *Batalla Vidal*, No. 18–589, the February 13, 2018 order granting respondents' motion for a preliminary injunction is vacated, the November 9, 2017 order partially denying the Government's motion to dismiss is affirmed in part, and the March 29, 2018 order partially denying the balance of the Government's motion to dismiss is reversed in part. All three cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring in part, concurring in the judgment in part, and dissenting in part.

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood ***1917** Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold. 908 F.3d 476, 518–520 (CA9 2018) (affirming the District Court's denial of the Government's motion to dismiss); see also *Batalla Vidal v. Nielsen*, 291 F.Supp.3d 260, 274 (EDNY 2018).

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these points, either singly or in concert, establishes a plausible equal protection claim." *Ante*, at 1915. But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. The *Batalla Vidal* complaints catalog then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." 291 F.Supp.3d at 276 (internal quotation marks omitted). The *Regents* complaints additionally quote President Trump's 2017 statement comparing undocumented immigrants to "animals" responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13." 298 F.Supp.3d 1304, 1314 (ND Cal. 2018) (internal quotation marks omitted). The plurality brushes these aside as "unilluminating," "remote in time," and having been "made in unrelated contexts." *Ante*, at 1916.

But "nothing in our precedent supports [the] blinkered approach" of disregarding any of the campaign statements as remote in time from later-enacted policies. *Trump* v. *Hawaii*, 585 U.S. ——, ——, n. 3, 138 S.Ct. 2392, 2438, n.3, 201 L.Ed.2d 775 (2018) (SOTOMAYOR, J., dissenting). Nor did any of the statements arise in unrelated contexts. They bear on unlawful

migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Cf. *ibid.* (noting that Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017), which barred entry of individuals from several Muslim-majority countries, was an outgrowth of the President's campaign statements about Muslims). Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." 585 U.S., at ——, 138 S.Ct., at 2440 (opinion of SOTOMAYOR, J.). This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. *Ante*, at 1916 ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection ***1918** grounds"). But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the "specific sequence of events leading up to the challenged decision." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. App. 718–720. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a "significant mismatch between the decision ... made and the rationale ... provided." *Department of Commerce* v. *New York*, 588 U.S. ——, ——, 139 S.Ct. 2551, 2575, 204 L.Ed.2d 978 (2019). Only by bypassing context does the plurality conclude otherwise.

* * *

The facts in respondents' complaints create more than a "sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand. Because the Court prematurely disposes of respondents' equal protection claims by overlooking the strength of their complaints, I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment.

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, concurring in the judgment in part and dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the ***1919** requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their

successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.[1]

I

A

In 2012, after more than two dozen attempts by Congress to grant lawful status to aliens who were brought to this country as children,[2] the then-Secretary of Homeland Security Janet Napolitano announced, by memorandum, a new "prosecutorial discretion" policy known as DACA. App. to Pet. for Cert. in No. 18–587, p. 97a. The memorandum directed immigration enforcement officers not to remove "certain ***1920** young people who were brought to this country as children" that met delineated criteria. *Id.*, at 97a–98a. In the Secretary's view, the program was consistent with "the framework of the existing law." *Id.*, at 101a.

DACA granted a renewable 2-year period of "deferred action" that made approximately 1.7 million otherwise removable aliens eligible to remain in this country temporarily.[3] By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. See 8 U.S.C. §§ 1611(b)(2)–(4); 8 CFR § 1.3(a)(4)(vi) (2020); 45 CFR § 152.2(4)(vi) (2019). In addition, deferred action enabled the recipients to seek work authorization. 8 U.S.C. § 1324a(h)(3)(B); 8 CFR § 274a.12(c)(14). Despite these changes, the memorandum contradictorily claimed that it "confer[red] no substantive right [or] immigration status," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." App. to Pet. for Cert. in No. 18–587, at 101a.

In 2014, then-Secretary of Homeland Security Jeh Johnson broadened the deferred-action program in yet another brief memorandum. This 2014 memorandum expanded DACA eligibility by extending the deferred-action period to three years and by relaxing other criteria. It also implemented a related program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA allowed unlawfully present parents to obtain deferred action derivatively through their children who were either citizens or lawful permanent residents. Approximately 4.3 million aliens qualified for DAPA and, as with DACA, these individuals would have become eligible for certain federal and state benefits upon the approval of their DAPA

applications. See *Texas v. United States*, 809 F.3d 134, 181 (CA5 2015). Nevertheless, the 2014 memorandum repeated the incongruous assertion that these programs "d[id] not confer any form of legal status in this country" and added that deferred action "may be terminated at any time at the agency's discretion." App. to Pet. for Cert. in No. 18–587, at 104a.

B

Twenty-six States filed suit to enjoin the implementation of these new programs, DAPA and "expanded DACA," maintaining that they violated the Constitution, the Administrative Procedure Act (APA), and the Immigration and Naturalization Act (INA). The States contended that, because the 2014 memorandum allowed aliens to receive deferred action and other benefits, it amounted to a legislative rule that had to comply with the APA's notice and comment procedures. The States also argued that DHS' decision to recategorize an entire class of aliens from "unlawfully present" to "lawfully present" exceeded its statutory authority under the federal immigration laws. According to the States, these defects rendered the 2014 memorandum arbitrary, capricious, or otherwise not in accordance with law.

The District Court preliminarily enjoined DAPA and expanded DACA. The Fifth Circuit affirmed, rejecting DHS' claim that the programs were an exercise of prosecutorial discretion. *Texas*, 809 F.3d at 167, 188. The court concluded that the States were likely to succeed on their claim that the 2014 memorandum was a legislative rule that had to be adopted through notice and comment rulemaking. ***1921** *Id.*, at 171–178. The court further concluded that the 2014 memorandum was "substantively contrary to law" because the INA did not grant DHS the statutory authority to implement either program. *Id.*, at 170, 178–186.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. *United States* v. *Texas*, 579 U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (*per curiam*).

C

The 2014 memorandum was rescinded on June 15, 2017, before taking effect. Shortly after that rescission, several of the plaintiff States sent a letter to then-Attorney General Jefferson Sessions III. They contended that the 2012 DACA memorandum was also legally defective because, "just like DAPA, DACA unilaterally confers eligibility for ... lawful presence without any statutory authorization from Congress." App. 873. The States wrote that they would amend their complaint to challenge DACA if the administration did not rescind the 2012 memorandum creating DACA by September 5, 2017.

On September 4, then-Attorney General Sessions wrote to then-Acting Secretary of Homeland Security Elaine Duke, advising her to rescind DACA. Sessions stated that, in his legal opinion, DACA took effect "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." *Id.*, at 877. The letter also stated that DACA was infected with the "same legal ... defects that the courts recognized as to DAPA," *id.*, at 878, and thus DACA would likely be enjoined as well.

Then-Acting Secretary Duke rescinded DACA the next day, also through a memorandum. Her memorandum began by noting that DACA "purported to use deferred action ... to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law." App. to Pet. for Cert. in No. 18–587, at 112a. It described the history of the Fifth Circuit litigation, noting that the court had concluded that DAPA "conflicted with the discretion authorized by Congress" because "the [INA] flatly does not permit the reclassification of millions of illegal aliens as lawfully present." *Id.*, at 114a (internal quotation marks omitted). Finally, the memorandum accepted then-Attorney General Sessions' legal determination that DACA was unlawful for the same reasons as DAPA. See § 1103(a)(1). In light of the legal conclusions reached by the Fifth Circuit and the Attorney General, then-Acting Secretary Duke set forth the procedures for winding down DACA.

These three cases soon followed. In each, respondents claimed, among other things, that DACA's rescission was arbitrary and capricious under the APA. Two District Courts granted a preliminary nationwide injunction, while the third vacated the rescission.

II

" '[A]n agency literally has no power to act ... unless and until Congress confers power upon it.' " *Arlington v. FCC*, 569 U.S. 290, 317, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (ROBERTS, C.J., dissenting) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)). When an agency exercises power beyond the bounds of its authority, it acts unlawfully. See, *e.g.*, *SAS Institute Inc.* v. *Iancu*, 584 U.S. ——, ——, n., 138 S.Ct. 1348, 1358, n., 200 L.Ed.2d 695 (2018). The 2012 memorandum ***1922** creating DACA provides a poignant illustration of ultra vires agency action.

DACA alters how the immigration laws apply to a certain class of aliens. "DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable." *Texas v. United States*, 328 F.Supp.3d

662, 713 (SD Tex. 2018) (footnote omitted). But DACA granted its recipients deferred action, *i.e.*, a decision to "decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to institute a final order of [removal]." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (internal quotation marks omitted). Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. See *supra*, at 1919. Thus, DACA in effect created a new exception to the statutory provisions governing removability and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. The decision to rescind an unlawful agency action is *per se* lawful. No additional policy justifications or considerations are necessary. And, the majority's contrary holding—that an agency is not only permitted, but required, to continue an ultra vires action—has no basis in law.

A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions.

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized knowledge related to their employers. See §§ 1101(a)(15)(A)–(V), 1184; 8 CFR § 214.1; see also Congressional Research Service, J. Wilson, Nonimmigrant and Immigrant Visa Categories: Data Brief 1–6 (2019) (Table 1). In addition, the statutes permit the Attorney General to grant temporary "parole" into the United States "for urgent humanitarian reasons or [a] significant public benefit," ***1923** 8 U.S.C. § 1182(d)(5)(A); provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict "would pose a serious threat to [an alien's] personal safety," § 1254a(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§ 1187(a)–(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§ 1201, 1255(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, "special immigrants," and those entering the country to "engag[e] in a new commercial enterprise." §§ 1153(a)–(b), 1154; see also Congressional Research Service, Nonimmigrant and Immigrant Visa Categories, at 6–7 (Table 2). Refugees and asylees also may receive lawful permanent residence under certain conditions, § 1159; 8 CFR §§ 209.1, 209.2.[4] As with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.[5]

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions agreed, "specific and detailed provisions[of] the INA expressly and carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present." *Texas*, 809 F.3d at 179. In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with "broad general directives" and leaving it to the agency to fill in the lion's share of the details, *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), Congress put in place intricate specifications governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (An

agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted" (internal quotation marks omitted)); see also *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 509–510, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988).

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS' delegated authority. ***1924** Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See *Texas*, 328 F.Supp.3d at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute's removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. See 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (certain individuals covered under the Violence Against Women Act are "eligible for deferred action"); Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1522 (" 'Any individual described in subclause (I) is eligible for deferred action' "); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, § 423(b), 115 Stat. 361 ("Such spouse, child, son, or daughter may be eligible for deferred action"); National Defense Authorization Act for Fiscal Year 2004, §§ 1703(c)(1)(A), (2), 117 Stat. 1694–1695 ("Such spouse or child shall be eligible for deferred action").[6] Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. §§ 1229b(a)–(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. § 1229b(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§ 1158, 1231(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. § 1227(d). And, aliens may voluntarily depart rather than be subject to an order of removal. § 1229c.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion ***1925** to DHS to provide additional programmatic forms of relief.[7]

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary's ability to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," § 1103(a)(3), or to "[e]stablis[h] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). See also 8 U.S.C. § 1103(g)(2). Because we must interpret the statutes "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary's ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by "allow[ing the Secretary of DHS] to grant lawful presence ... to any illegal alien in the United States." *Texas*, 809 F.3d at 184. Not only is this "an untenable position in light of the INA's intricate system," *ibid.*, but it would also render many of those provisions wholly superfluous due to DHS' authority to disregard them at will, *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption that "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). And it would also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make "decisions of vast economic and political significance." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (*UARG*) (internal quotation marks omitted); see also *Texas*, 787 F.3d at 760–761.

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is "inconsisten[t] with the design and structure of the statute as a whole." *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 353, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013). As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, "[i]nstead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence ...

to individuals Congress has deemed deportable or removable." *Texas v. United States*, 86 F.Supp.3d 591, 654 (SD Tex. 2015). The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as "alien entrepreneurs," § 1186b, is simultaneously capacious enough for DHS to ***1926** grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary's pen.

B

Then-Attorney General Sessions concluded that the initial DACA program suffered from the "same legal ... defects" as DAPA and expanded DACA, finding that, like those programs, DACA was implemented without statutory authority. App. 877–878. Not only was this determination correct, but it is also dispositive for purposes of our review. "It is axiomatic that an administrative agency's power ... is limited to the authority granted by Congress." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.

The majority opts for a different path, all but ignoring DACA's substantive legal defect. See *ante*, at 1910 – 1911. On the majority's understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule "has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court's opinion." *Massachusetts v. EPA*, 549 U.S. 497, 536, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (ROBERTS, C.J., dissenting).

The lack of support for the majority's position is hardly surprising in light of our Constitution's separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio*. Cf. *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); see also *EPA v. EME Homer City Generation, L. P.*, 572 U.S. 489, 542, n. 5, 134 S.Ct. 1584, 188 L.Ed.2d 775 (2014) (Scalia, J., dissenting); *Public Citizen v. Department of Justice*, 491 U.S. 440, 487, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring in judgment). In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, *Arlington*, 569 U.S. at 327, 133 S.Ct. 1863 (ROBERTS, C.J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits, see *UARG*,

573 U.S. at 327–328, 134 S.Ct. 2427; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See *UARG*, 573 U.S. at 327, 134 S.Ct. 2427. In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

III

The majority's demanding review of DHS' decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA's procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely provides an independent basis for rescinding DACA. But at the very least, this ***1927** procedural defect compounds the absurdity of the majority's position in these cases.

As described above, DACA fundamentally altered the immigration laws. It created a new category of aliens who, as a class, became exempt from statutory removal procedures, and it gave those aliens temporary lawful presence. Both changes contravened statutory limits. DACA is thus what is commonly called a substantive or legislative rule.[8] As the name implies, our precedents state that legislative rules are those that "have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) (internal quotation marks omitted).

Our precedents allow the vast majority of legislative rules to proceed through so-called "informal" notice and comment rulemaking. See *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 237–238, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973).[9] But under our precedents, an agency must engage in certain procedures mandated by the APA before its rule carries legal force. *Kisor* v. *Wilkie*, 588 U.S. ——, ——, 139 S.Ct. 2400, 2420, 204 L.Ed.2d 841 (2019) (plurality opinion) ("[A] legislative rule, ... to be valid[,] must go through notice and comment"); *id.*, at ——, 139 S.Ct., at 2434 (GORSUCH, J., concurring in judgment) (same); *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 96, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015); cf. *Azar* v. *Allina Health Services*, 587 U.S. ——, ——, 139 S.Ct. 1804, 1808, 204 L.Ed.2d 139 (2019) (same with respect to materially identical procedures under the Medicare Act). These procedures specify that the agency "shall"

publish a notice of proposed rulemaking in the Federal Register, justify the rule by reference to legal authority, describe "the subjects and issues involved" in the rule, and allow interested parties to submit comments. 5 U.S.C. §§ 553(b)–(c); see also *Kisor*, 588 U.S., at ——, 139 S.Ct., at 2434 (opinion of GORSUCH, J.). As we have recognized recently, use of the word "shall" indicates that these procedures impose mandatory obligations on the agency before it can adopt a valid binding regulation. See *Maine Community Health Options* v. *United States*, 590 U.S. ——, ——, 140 S.Ct. 1308, 1320, —— L.Ed.2d —— (2020). After undergoing notice and comment, the agency then publishes the final rule, which must "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). Only after completing this process is the legislative rule a valid law. See *Kisor*, 588 U.S., at ——, 139 S.Ct., at 2434 (opinion of GORSUCH, J.).[10]

Because DACA has the force and effect of law, DHS was required to observe the ***1928** procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program's dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See *id.*, at ——, 139 S.Ct., at 2420 (plurality opinion); *id.*, at ——, 139 S.Ct., at 2434 (opinion of GORSUCH, J.).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill *any* ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning. And, it is well established that we do not remand for an agency to correct its reasoning when it was required by law to take or abstain from an action. See *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544–545, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA.[11] It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See *infra*, at 1930 – 1931. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, none of this matters, because DHS *did* provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify its rescission.[12] By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply ***1929** with the relevant procedures before functionally binding regulated parties. See, *e.g.*, *Mendoza v. Perez*, 754 F.3d 1002 (CADC 2014); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (CADC 2011); *National Family Planning & Reproductive Health Assn., Inc. v. Sullivan*, 979 F.2d 227 (CADC 1992). But going forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.[13]

IV

Even if I were to accept the majority's premise that DACA's rescission required additional policy justifications, the majority's reasons for setting aside the agency's decision still fail.

A

First, the majority claims that the Fifth Circuit discussed only the legality of the 2014 memorandum's conferral of benefits, not its "forbearance component"—*i.e.*, the decision not to place DACA recipients into removal proceedings. *Ante*, at 1911. The majority, therefore, claims that, notwithstanding the then-Attorney General's legal conclusion, then-Acting Secretary Duke

was required to consider revoking DACA recipients' lawful presence and other attendant benefits while continuing to defer their removal. *Ante*, at 1912 – 1913. Even assuming the majority correctly characterizes the Fifth Circuit's opinion, it cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.[14]

***1930** The then-Attorney General reviewed the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA's text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented without statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General's legal analysis and rescinded the program. This legal conclusion more than suffices to supply the "reasoned analysis" necessary to rescind an unlawful program. *State Farm*, 463 U.S. at 42, 103 S.Ct. 2856.

The majority has no answer except to suggest that this approach is inconsistent with *State Farm*. See *ante*, at 1911 – 1913. But in doing so, the majority ignores the fact that, unlike the typical "prior policy" contemplated by the Court in *State Farm*, DACA is unlawful. Neither *State Farm* nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather than responding with authority of its own, the majority simply opts to excise the "unlawful policy" aspect from its discussion.

B

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. *Ante*, at 1913 – 1915. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. §§ 706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action.[15]

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government's discretion and can be revoked at any time. See App. to Pet. for Cert. in No. 18–587, at 104a (DACA and expanded DACA); 8 CFR § 214.11(j)(3) (T visas); § 214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People's Republic of China). The Government has made clear time and again that, because "deferred action is not an immigration status, no alien has the right to deferred action. It is ***1931** used solely in the discretion of the [Government] and confers no protection or benefit upon an alien." DHS Immigration and Customs Enforcement Office of Detention and Removal, Detention and Deportation Officers' Field Manual § 20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm'r, INS, to Regional Directors et al., pp. 11–12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority's unsupported assertion, *ante*, at 1913, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.[16]

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA's inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that "DHS can terminate or renew deferred action at any time at the agency's discretion." Consideration of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part *because* deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that "DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion." Brief for Appellants in *Texas v. United States*, No. 1540238, p. 7; see also *id.*, at 45–46. And before this Court, in that same litigation, DHS reiterated that "DHS has absolute discretion to revoke deferred action unilaterally, without notice or process." Brief for United States in *United States* v. *Texas*, O.T. 2015, No. 15–674, p. 5; see also *id.*, at 37. If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA's issuance, not its rescission.

* * *

President Trump's Acting Secretary of Homeland Security inherited a program created by President Obama's Secretary that was implemented without statutory authority and without following the APA's required procedures. Then-Attorney General Sessions correctly concluded that this

ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS was required to overlook DACA's obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions.

Justice ALITO, concurring in the judgment in part and dissenting in part.

*1932 Anyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA's rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

I join Justice THOMAS's opinion. DACA presents a delicate political issue, but that is not our business. As Justice THOMAS explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2); see *Heckler v. Chaney*, 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by Justice KAVANAUGH. See *post*, at 1933 – 1936 (opinion concurring in the judgment in part and dissenting in part).

Justice KAVANAUGH, concurring in the judgment in part and dissenting in part.

For the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not have legal status in the

United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants.

In 2012, exercising its view of the Executive's prosecutorial discretion under Article II and the immigration laws, President Obama's administration unilaterally instituted a program known as Deferred Action for Childhood Arrivals, or DACA. Under DACA, eligible young immigrants may apply for and receive deferred action. They must renew their DACA status every two years. Under the program, the Executive Branch broadly forbears from enforcing certain immigration removal laws against DACA recipients. And by virtue of the forbearance, DACA recipients also become eligible for work authorization and other benefits.

Since 2017, President Trump's administration has sought to rescind DACA based on its different and narrower understanding of the Executive's prosecutorial discretion under Article II and the immigration laws. In its view, the Executive Branch legally may not, and as a policy matter should not, *unilaterally* forbear from enforcing the immigration laws against such a large class of individuals. The current ***1933** administration has stated that it instead wants to work with Congress to enact comprehensive legislation that would address the legal status of those immigrants together with other significant immigration issues.

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch's exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint —namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The Executive Branch explained its decision to rescind DACA in two sequential memorandums by successive Secretaries of Homeland Security: the 2017 Duke Memorandum and the 2018 Nielsen Memorandum. The Duke Memorandum focused on DACA's perceived legal flaws. The Court today finds the Duke Memorandum insufficient under the APA's arbitrary-and-capricious standard.

But regardless of whether the Court is correct about the Duke Memorandum, the Nielsen Memorandum more fully explained the Department's legal reasons for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients. The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA. Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action.

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a "rule" setting forth "an agency statement of general ... applicability and future effect designed to implement ... policy." 5 U.S.C. § 551(4). Because it is a rule, the Nielsen Memorandum constitutes "agency action." § 551(13). As the Secretary of Homeland ***1934** Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke's decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration. Courts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency's bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a *post hoc* justification for rescinding DACA. *Ante*, at 1908 – 1909. Under our precedents, however, the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges). See, *e.g.*, *State Farm*, 463 U.S. at 50, 103 S.Ct. 2856 ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *FPC v. Texaco Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974) (same); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443–444, 85 S.Ct. 1061, 13 L.Ed.2d 951

(1965) (same); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962) (same). As the D. C. Circuit has explained, the *post hoc* justification doctrine "is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (2006) (Garland, J.) (internal quotation marks omitted).

Indeed, the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the *post hoc* justification doctrine today. The Court's refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider. *Ante,* at 1911 – 1915.

To be sure, cases such as *Overton Park* and *Camp* v. *Pitts* suggest that courts reviewing certain agency *adjudications* may in some circumstances decline to examine an after-the-fact agency explanation. See *Camp v. Pitts*, 411 U.S. 138, 142–143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (*per curiam*); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–421, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). But agency adjudications are "concerned with the determination of past and present rights and liabilities," Attorney General's Manual on the Administrative Procedure Act 14 (1947), and implicate the due process interests of the individual parties to the adjudication. Judicial review of an adjudication therefore ordinarily focuses on what happened during the agency's adjudication ***1935** process of deciding that individual case.

Even if certain agency adjudications have a slightly more stringent restriction on *post hoc* explanations, the APA is "based upon a dichotomy between rule making and adjudication," *ibid.*, and this case involves an ongoing agency rule that has future effect—the rescission of DACA. The Nielsen Memorandum implements and explains the rescission of DACA. I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule. For purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures. In my view, the Court should consider the Nielsen Memorandum in deciding whether the Department's rescission of DACA satisfies the APA's arbitrary-and-capricious standard.

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland Security for further explanation. Although I disagree with the Court's decision to remand, the only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court's opinion. *Ante,* at 1913 – 1915.[1]

* * *

The Court's resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress's inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the prospect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Nation's immigration system. In the meantime, as to the narrow APA question presented here, I appreciate the Court's careful analysis, ***1936** but I ultimately disagree with its treatment of the Nielsen Memorandum. I therefore respectfully dissent from the Court's judgment on plaintiffs' APA claim, and I concur in the judgment insofar as the Court rejects plaintiffs' equal protection claim.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Plaintiffs also raised notice and comment claims, which uniformly failed below, and assorted due process challenges, some of which survived motions to dismiss. Those claims are not before us.

2 In a related challenge not at issue here, the District Court for the District of Maryland granted partial summary judgment in favor of the Government. *Casa de Maryland v. United States Dept. of Homeland Security*, 284 F.Supp.3d 758 (2018). After the Government filed petitions for certiorari in the instant cases, the Fourth Circuit reversed that decision and vacated Acting Secretary Duke's rescission as arbitrary and capricious. *Casa de Maryland v. United States Dept. of Homeland Security*, 924 F.3d 684 (2019), cert. pending, No. 18–1469. The Fourth Circuit has since stayed its mandate.

3 Justice KAVANAUGH further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. *Post*, at 1934 – 1936 (opinion concurring in judgment in part and dissenting in part). But he cites no authority limiting

this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument.

4 The Government contends that Acting Secretary Duke also focused on litigation risk. Although the background section of her memo references a letter from the Texas Attorney General threatening to challenge DACA, the memo never asserts that the rescission was intended to avert litigation. And, given the Attorney General's conclusion that the policy was unlawful—and thus presumably could not be maintained or defended in its current form—it is difficult to see how the risk of litigation carried any independent weight.

5 As the Fifth Circuit noted, DAPA recipients were eligible for Social Security and Medicare benefits because they had been designated "lawfully present." *Texas*, 809 F.3d at 168. Lawful presence is a statutory prerequisite for receipt of certain benefits. See *id.*, at 148 (citing 8 U.S.C. § 1611). It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, see 8 CFR § 1.3; 42 CFR § 417.422(h), agencies can also exclude them from this designation, see 45 CFR § 152.2(8) (2019) (specifying that DACA recipients are not considered lawfully present for purposes of coverage under the Affordable Care Act).

6 The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to "determine whether [DACA recipients] qualify for work authorization." App. to Pet. for Cert. 101a. The benefits associated with DACA flow from a separate regulation. See 8 CFR § 1.3(a)(4)(vi); see also 42 CFR § 417.422(h) (cross-referencing 8 CFR § 1.3). Thus, DHS could have addressed the Attorney General's determination that such benefits were impermissible under the INA by amending 8 CFR § 1.3 to exclude DACA recipients from those benefits without rescinding the DACA Memorandum and the forbearance policy it established. But Duke's rescission memo shows no cognizance of this possibility.

7 Our affirmance of the *NAACP* order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in *Regents* and *Batalla Vidal*.

1 I concur in the judgment insofar as the majority rejects respondents' equal protection claim.

2 See Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001, H. R. 1582, 107th Cong., 1st Sess.; Student Adjustment Act of 2001, H. R. 1918, 107th Cong., 1st Sess.; DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001); DREAM Act, S. 1545, 108th Cong., 1st Sess. (2003); Student Adjustment Act of 2003, H. R. 1684, 108th Cong., 1st Sess.; DREAM Act, S. 2863, 108th Cong., 2d Sess., Tit. XVIII (2003); DREAM Act of 2005, S. 2075, 109th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess., Tit. VI, Subtitle C; American Dream Act, H. R. 5131, 109th Cong., 2d Sess. (2006); DREAM Act of 2007, S. 774, 110th Cong., 1st Sess.; DREAM Act of 2007, S. 2205, 110th Cong., 1st Sess.; STRIVE Act of 2007, H. R. 1645, 110th Cong., 1st Sess., Tit. VI, Subtitle B; Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., 1st Sess., Tit. VI, Subtitle C; DREAM Act of 2009, S. 729, 111th Cong., 1st Sess.; American Dream Act, H. R. 1751, 111th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong., 2d Sess., Tit. V, Subtitle D; DREAM Act of 2010, S. 3827, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3962, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3963, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3992, 111th Cong., 2d Sess.; DREAM Act of 2010, H. R. 6497, 111th Cong., 2d Sess.; DREAM Act of 2011, S. 952, 112th Cong., 1st Sess.

3 See J. Passel & M. Lopez, Pew Research Center, Up to 1.7 Million Unauthorized Immigrant Youth May Benefit From New Deportation Rules (Aug. 14, 2012).

4 The immigration statutes also provide for conditional lawful permanent residence status. See § 1186a(b)(1)(A)(i) (two years for spouses to demonstrate that the marriage "was [not] entered into for the purpose of procuring an alien's admission as an immigrant"); § 1186b (qualifying business entrepreneurs).

5 For instance, Congress has carved out rules for aliens who served in the Armed Forces, §§ 1438–1440, and alien spouses who have been subject to domestic abuse, §§ 1186a(c)(4)(C)–(D).

6 In the DAPA litigation, DHS noted that some deferred-action programs have been implemented by the Executive Branch without explicit legislation. But " 'past practice does not, by itself, create [executive] power.' " *Medellín v. Texas*, 552 U.S. 491, 532, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981)). If any of these programs had been challenged, it would seem that they would be legally infirm for the same reasons as DACA. Moreover, if DHS had the authority to create new categories of aliens eligible for deferred action, then all of Congress' deferred-action legislation was but a superfluous exercise. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). Finally, whereas some deferred-action programs were followed by legislation, DACA has existed for eight years, and Congress is no closer to a legislative solution than it was in 2012. See, *e.g.*, American Dream and Promise Act of 2019, H. R. 6, 116th Cong., 1st Sess.

7 It is uncontested that deferred action frequently occurs on a case-by-case basis, often justified on the grounds that the agency lacks resources to remove all removable aliens. Even assuming that these ad hoc exercises of discretion are permissible, however, we have

stated that "[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014).

8 The majority tacitly acknowledges as much, as it must. See *ante*, at 1906 – 1907. Otherwise, the majority would have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable. See *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

9 As I have previously pointed out, "the APA actually contemplated a much more formal process for most rulemaking." *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 128, n. 5, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015) (opinion concurring in judgment).

10 The APA also provides certain exceptions from notice and comment rulemaking. For example, an agency may promulgate a legally binding rule without notice and comment if good cause exists to do so. 5 U.S.C. § 553(b)(B). This text would become a nullity if the agency could achieve the same effect by simply dispensing with notice and comment procedures altogether.

11 Thus, it is not that the APA "*should* not" be construed to support the majority's result, *ante*, at 1914 (emphasis added), it is that the APA does not and *cannot* support that result.

12 I express no view on what other reasons would justify an agency's decision to rescind a procedurally unlawful action. I merely point out that correctly concluding that the program was illegal is sufficient.

13 In my view, even if DACA were permitted under the federal immigration laws and had complied with the APA, it would still violate the Constitution as an impermissible delegation of legislative power. See *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 77, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (THOMAS, J., concurring in judgment). Putting aside this constitutional concern, however, the notice and comment process at least attempts to provide a "surrogate political process" that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process. Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin. L. Rev. 703, 708 (1999).

14 The majority's interpretation of the Fifth Circuit's opinion is highly questionable. Because a grant of deferred action renders DACA recipients eligible for certain benefits and work authorization, it is far from clear that the Department could separate DACA's "forbearance component" from the major benefits it conferred without running into yet another APA problem. The majority points to the fact that, under the Patient Protection and Affordable Care Act of 2010, relevant regulations exclude those receiving deferred action through DACA from coverage. *Ante*, at 1911, n. 5. But that misses the point. Those regulations were promulgated before "anyone with deferred action under the DACA process applie[d]" for those benefits. See 77 Fed. Reg. 52616 (2012). By contrast, DACA recipients have been eligible for and have received Medicare, Social Security, and work authorization for years. DHS therefore is not writing on a blank slate. Under the majority's rule, DHS would need to amend all relevant regulations and explain why *all* recipients of deferred action who have previously received such benefits may no longer receive them. Alternatively and perhaps more problematically, it would need to provide a reason why other recipients of deferred action should continue to qualify, while DACA recipients should not. It thus seems highly likely that the majority's proposed course of action would be subject to serious arbitrary and capricious challenges.

15 The majority contends that this argument does not carry force because the rescission implemented a winddown period during which recipients would continue to receive benefits. But whether DHS' decision to wind down DACA was lawful is a separate question from whether DHS was required to consider reliance interests before discontinuing an unlawful program.

16 The majority's approach will make it far more difficult to change deferred-action programs going forward, which is hardly in keeping with this Court's own understanding that deferred action is an "exercise in administrative discretion" used for administrative "convenience." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). Agencies will likely be less willing to grant deferred action knowing that any attempts to undo it will require years of litigation and time-consuming rulemakings.

1 Because I conclude that the Executive Branch satisfied the APA's arbitrary-and-capricious standard, I need not consider whether its prosecutorial enforcement policy was "committed to agency discretion by law" and therefore not subject to APA arbitrary-and-capricious review in the first place. 5 U.S.C. § 701(a)(2). Several judges have advanced arguments suggesting that DACA—at least to the extent it was simply an exercise of forbearance authority—and the repeal of DACA are decisions about whether and to what extent to exercise prosecutorial discretion against a class of offenses or individuals, and are therefore unreviewable under the APA as "committed to agency discretion by law." *Ibid.*; see *Casa De Maryland v. United States Dept. of Homeland Security*, 924 F.3d 684, 709–715 (CA4 2019) (Richardson, J., concurring in part and dissenting in part); *Regents of Univ. Cal. v. United States Dept. of Homeland Security*, 908 F.3d 476, 521–523 (CA9 2018) (Owens, J., concurring in judgment); see also *Texas v. United States*,

809 F.3d 134, 196–202 (CA5 2015) (King, J., dissenting); *Texas v. United States*, 787 F.3d 733, 770–776 (CA5 2015) (Higginson, J., dissenting); cf. *Heckler v. Chaney*, 470 U.S. 821, 831–835, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); *ICC v. Locomotive Engineers*, 482 U.S. 270, 277–284, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *In re Aiken County*, 725 F.3d 255, 262–264 (CADC 2013).

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THE CORNER

IMMIGRATION

Did the DACA Ruling Bury Constitutionalism?

By MARK KRIKORIAN | August 10, 2020 6:39 PM

DACA recipients celebrate outside the Supreme Court in Washington, D.C., June 18, 2020. (Jonathan Ernst/Reuters)

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In response to Do Americans Even Care If There's a Constitution?

In reacting to President Trump's recent executive orders, Jim Geraghty asks "Do Americans Even Care If There's a Constitution?" He reluctantly suggests that the

answer is "no."

This didn't happen all at once — Woodrow Wilson was probably the first notable to explicitly express the progressive frustration with the Constitution's system of limited powers. Decades of preposterous Supreme Court rulings, such as *Roe*, *Obergefell*, and *Bostock*, have made plain the Left's contempt for constitutional governance. And to Jim's question, "Did the education system fail them so thoroughly that they can't even begin to grasp why concentrated government power would be a bad thing?" the answer, of course, is yes; Exhibit A is Ezra Klein (a college graduate, mind you) burbling that "the Constitution is not a clear document. Written 100 years ago, when America had thirteen states and very different problems, it rarely speaks directly to the questions we ask it."

Obama's pen-and-phone activity, most notably his administration's decree unilaterally rewriting immigration law by creating the DACA amnesty (and attempting to create the even larger DAPA), is very much in this vein. But the Left's contempt for both the actual Constitution and the very idea of constitutionalism has, in recent decades, been matched by a vigorous defense of it on the Right. Sometimes this has bled into fetishization of the document, but more important has been the Right's defense of a political culture of constitutionalism, as Yuval Levin and Adam White noted over the weekend.

So the real question is whether the *Right* has given up on constitutionalism. Unlike with Obama, Trump's Caesarist impulses have mostly been talk. But these recent orders, however modest their scope, have been rationalized as necessary responses to congressional inaction — thus presenting an Obama-style usurpation of the legislative power.

But, Levin and White note, "so far, most Republicans in Congress seem reticent to say so."

This wavering commitment to constitutionalism on the Right isn't just a matter of rooting for your own team; it's clearly a response to the Supreme Court's DACA ruling in June. The president campaigned on repealing Obama's illegal DACA decree "on Day One," though it took sustained pressure from conservatives to get the administration to finally do it on Day 228.

Three years of fierce lawfare followed, as the Left turned to the courts to defend its policy gains, however illegitimately acquired. But conservatives were confident that, eventually, they would succeed in the rescission of a policy memo that was unmoored in law.

So when the Supreme Court proclaimed that this illegal program *had* to continue because the administration hadn't jumped through the right hoops — hoops the prior administration ignored entirely in concocting it in the first place — something broke on the Right. Many in the administration, in Congress, and among the citizenry simply concluded that this is now the only way it's possible to govern, and that fastidious avoidance of pen-and-phone governance by Republicans would represent unilateral disarmament. Even if the administration makes another go at rescission of DACA (assuming there's a second term) and this time leaves no pretext for our weather-vane chief justice to latch onto, the damage may be irreversible. If these are the new rules, we play by them or surrender.

I wish this weren't so. And maybe it's not permanent; maybe we can wade back across the Rubicon. But I fear that those of us insisting on adherence to constitutional governance are like the aging Roman Emperor Claudius, as channeled by Robert Graves, who hatches a plan for his son Britannicus to restore the Republic. The young man is appalled, and answers his father: "I don't believe in the Republic. No one believes in the Republic anymore. No one does except you. You're old, Father, and out of touch."

Are we constitutionalists equally out of touch?

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MARK KRIKORIAN is the executive director of the Center for Immigration Studies.
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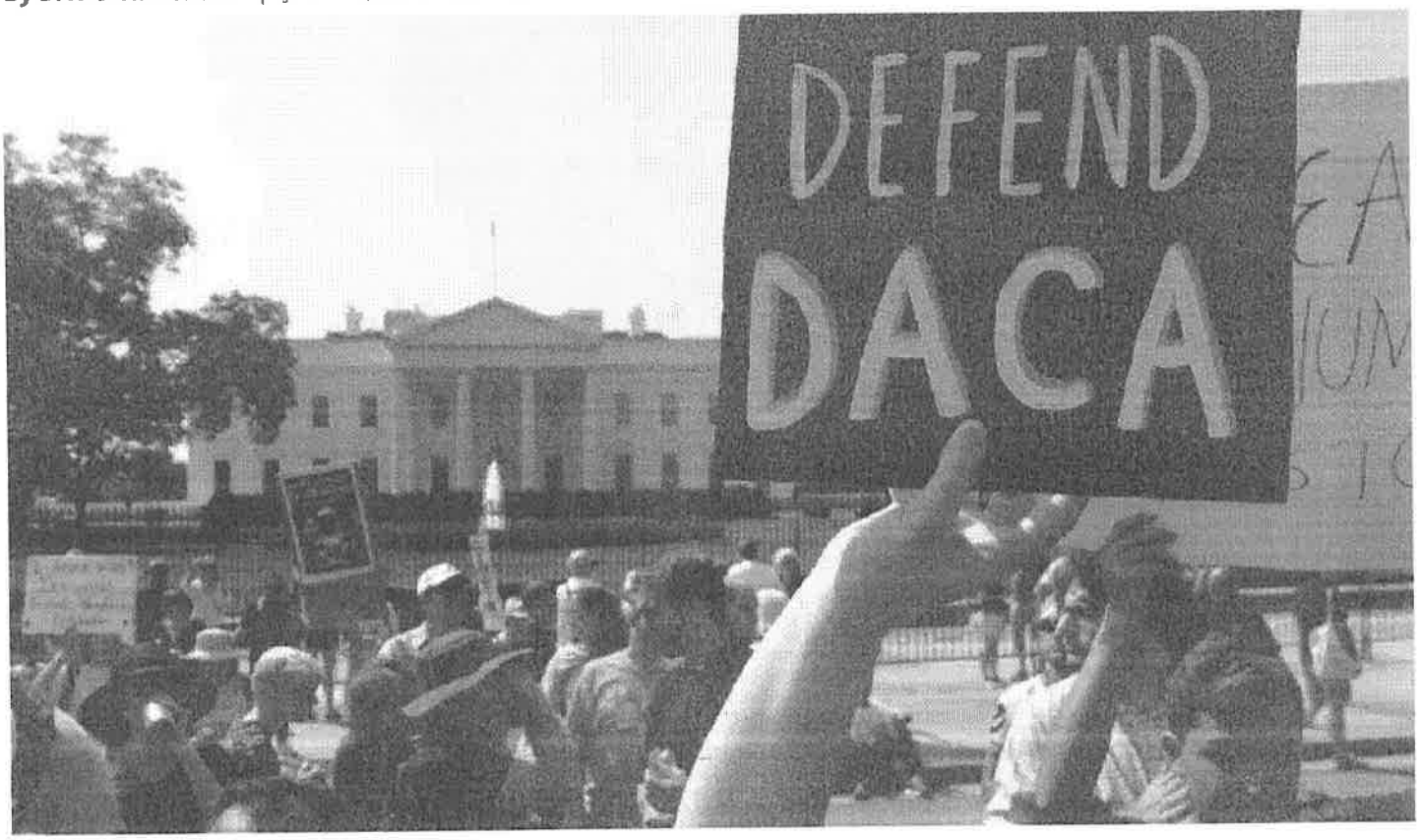
LAW & THE COURTS

It Doesn't Matter Whether DACA Is Popular

By DAVID HARSANYI | June 18, 2020 4:05 PM



DACA supporters outside the White House, September 2017 (Kevin Lamarque/Reuters)

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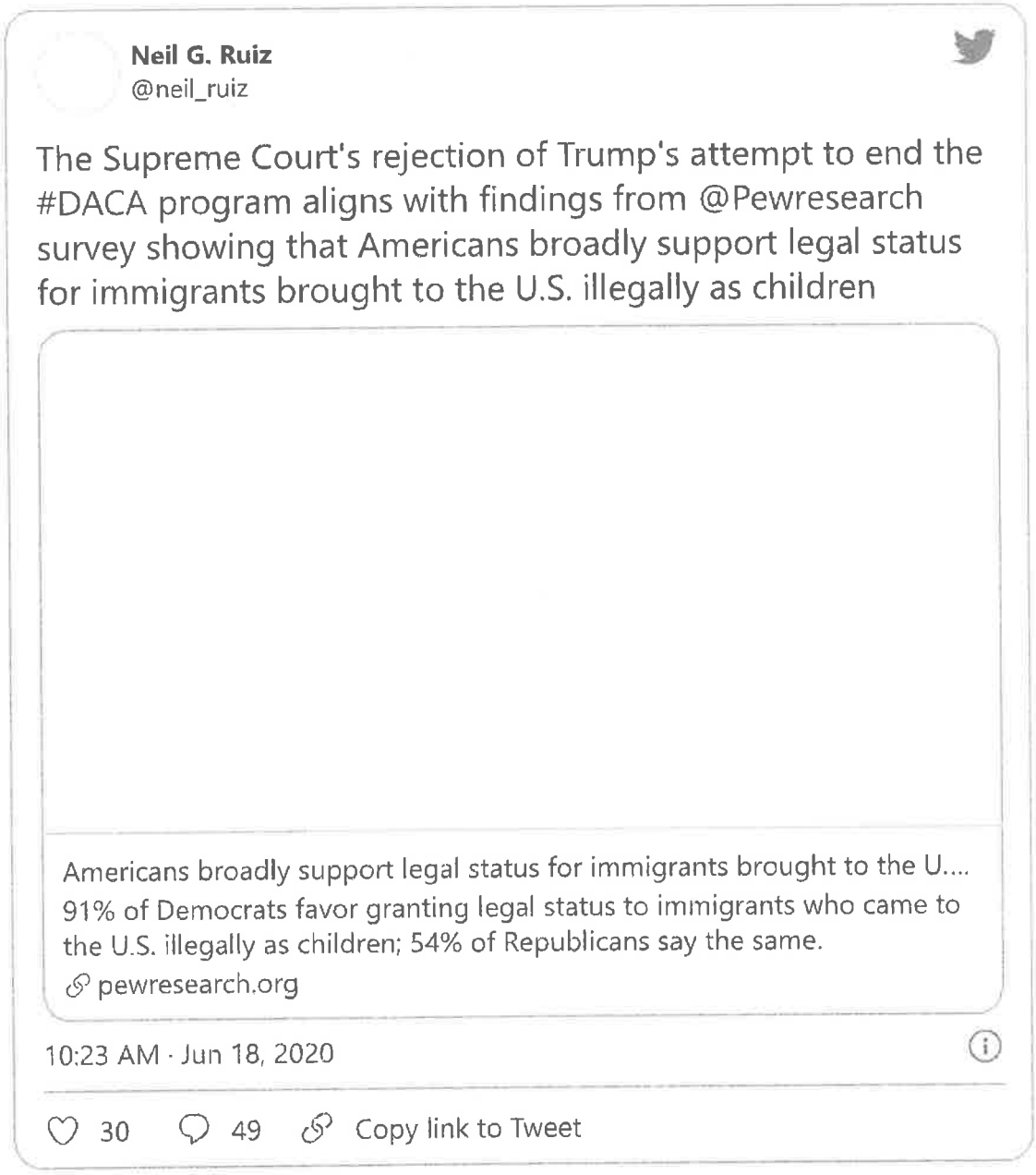
I understand that procedural arguments are boring, ineffective, and passe, and that fewer and fewer American are moved by them. But we might want pollsters

and media outlets to understand the difference between policy outcomes and constitutional process.

Take a look at this non sequitur:



As with the Supreme Court's recent re-imagining of Title VII protections, the media are acting as if the recent decision preventing Trump from immediately ending DACA was a referendum on values, empathy, and the intrinsic value of "Dreamers," rather than on the ability of the president to simply fabricate laws by fiat.

There are a number of persuasive economic and moral arguments for legalizing the children of illegal immigrants. Indeed, as it happens, I support the *goals* of DACA. But, if they are to become law, they need to . . . well, become law. I also support dropping the corporate income tax to zero. That doesn't mean I would approve of Donald Trump asking the IRS to stop collecting certain revenue streams by decree.

If you don't believe that DACA circumvents the proper constitutional process, just hear out Barack Obama, who, on numerous occasions, admitted as much.

In October of 2010:

> "... I am president, I am not king. I can't do these things just by myself. We have a system of government that requires the Congress to work with the executive branch to make it happen.

In March of 2011:

> "With respect to the notion that I can just suspend deportations through executive order, that's just not the case . . . . for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as president."

In July of 2011:

> "Now, I know some people want me to bypass Congress and change the laws on my own. And believe me, right now dealing with Congress, believe me, believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how; that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."

In Sept of 2011:

> "And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true . . . . We live in a democracy. You have to pass bills through the legislature, and then I can sign it."

Obama didn't lie about all the small things, only about all the big ones. And after signing the executive directive on DACA, Obama claimed it was just "a temporary stopgap measure."

Should presidents be able to "bypass Congress" and "change the laws" using "a temporary stopgap measure," and simply wait a few decades until his party has enough votes to pass it through the prescribed constitutional manner? Seems to me that undermines the entire purpose of having a Congress.

For years Democrats argued that Obama was impelled to act because Congress wouldn't do its "job." I'm sorry, but if you can't elect enough people to pass your priorities, or you're unable to find a compromise, that's your problem. Congress is under no edict to pass liberal priorities. And Dreamers are not predestined for protection.

Anyway, if SCOTUS is going to endorse executive abuse, it should, at the very least, have the decency to allow both sides to engage in it equally.

"Eight years ago this week," Obama wrote today, "we protected young people who were raised as part of our American family from deportation." *We* didn't do anything. You did, by yourself, without any congressional authorization, and against your own stated positions.

The question pollsters should be asking isn't whether the Supreme Court's rejection of Trump's attempt to end the DACA "aligns" with Americans support for legal status of illegal immigrants, but rather if it aligns with the idea presidents can "bypass Congress and change the laws."

Well, some presidents.

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DAVID HARSANYI is a senior writer for National Review and the author of *First Freedom: A Ride through America's Enduring History with the Gun.* **@davidharsanyi**

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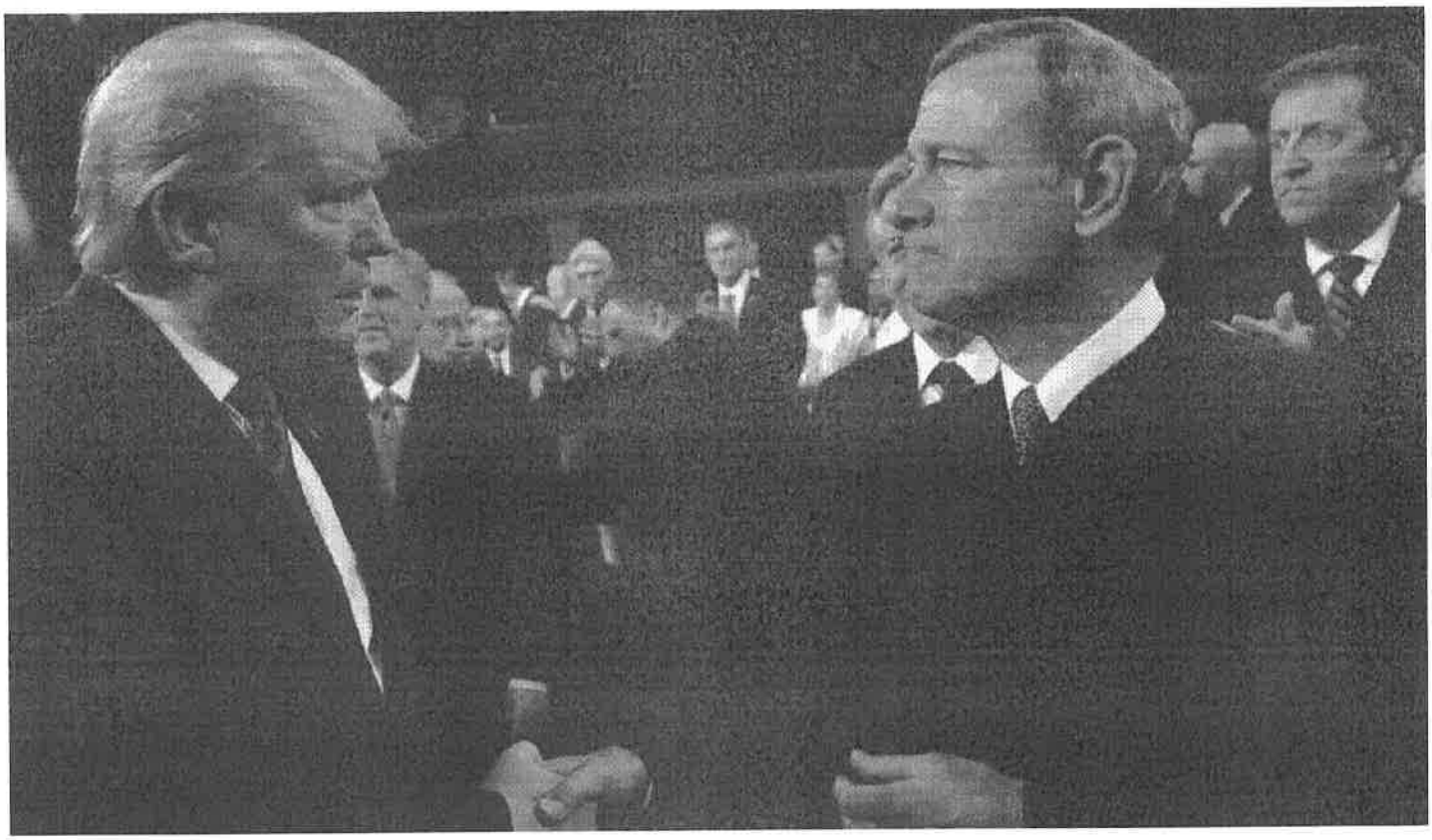
LAW & THE COURTS

Roberts' DACA Trick Blocks Disfavored Policy without Substantive Law Precedent

By **WESLEY J. SMITH** | June 18, 2020 4:32 PM



President Donald Trump greets Supreme Court Chief Justice John Roberts as he arrives to deliver his State of the Union address in the House Chamber in Washington, D.C., February 4, 2020. (Leah Millis/Reuters)

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When I heard about the reasoning in Chief Justice John Roberts's decision concerning the DACA case, I had a real deja vu experience. Roberts applied arcane administrative law jurisprudence to obtain a particular policy result he favored — and without creating a policy precedent that would bind future court rulings on the substance of the issue.

Here's the deja vu part: During the George W. Bush administration, Attorney General John Ashcroft issued a guidance that prohibited federally controlled substances from being used in assisted suicide. The lawsuits flew predictably, and the case ended up in the Supreme Court.

Just as Roberts did today, in 2006 Justice Anthony Kennedy, writing for a 6–3 majority in *Gonzales v Oregon*, ruled that the government *could indeed* prohibit controlled substances from use in assisted suicide. But *awww, gosh darn, too bad* — Ashcroft *went about it the wrong way*. From my analysis published here back then:

> The general media spin about the case has been that, as Reuters put it, the Supremes issued a "stinging rebuke" to the administration and endorsed the assisted suicide as a legitimate public policy. But this isn't true. Justice Anthony Kennedy's majority decision even acknowledged that the Justice Department was "reasonable" in its assertion that "medicine's boundaries" preclude assisted suicide. The majority also explicitly agreed that the federal government possesses the inherent power to prevent narcotics from being prescribed for assisted suicide, for example, by amending the federal Controlled Substances Act. The case provided neither a sweeping assertion of the validity of assisted suicide nor a ringing endorsement of its legality being strictly a matter of state's rights.
>
> So if the federal government can, in theory, preclude controlled substances from being used in assisted suicide, why did it lose? The majority believed that former Attorney General John Ashcroft went about that task in the wrong way. Specifically, it ruled that Ashcroft exceeded his authority when he determined that assisted suicide was not a "legitimate medical use" of controlled substances without obtaining any information about the practice

> of medicine, assisted suicide, or other relevant matters necessary to come to that conclusion from outside the Department of Justice. Consequently, the Court found, Ashcroft's interpretation, while reasonable, was not persuasive because it exceeded his "expertise."

See how that works?

You have to admire the elegance. Administrative law offers a great sleight of hand opportunity for "conservative" judges and justices to block policies with which they disapprove — and without leaving any incriminating ideological fingerprints.

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WESLEY J. SMITH is an author and a senior fellow at the Discovery Institute's Center on Human Exceptionalism. **@forcedexit**

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IMMIGRATION

DACA Drags On

By MARK KRIKORIAN | July 30, 2020 6:58 PM

DACA supporters outside the White House, September 2017 (Kevin Lamarque/Reuters)

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DACA is shaping up to be like the Spanish-American War tax or Jim Geraghty's USDA Agency of Invasive Species — an almost unkillable absurdity.

Since the first days of this administration, I've been trying to hold the president to his unequivocal promise to terminate the unlawful Deferred Action for

Childhood Arrivals (DACA) program "on Day One." The White House was afraid to follow through, but eventually, on Day 228, DHS rescinded (with a wind-down period) the Obama-era memo that granted work permits to roughly three-quarters of a million illegal immigrants who came here before age 16.

What no one anticipated at the time were the lengths to which our lawless courts would go to keep DACA in place; my colleague Andrew Arthur includes a DACA timeline in a piece today. The Supreme Court ruled 5–4 last month (guess who was number five) that DACA — a program pulled out of thin air, with no basis in statute or regulation — could only be rescinded by jumping through the hoops of the Administrative Procedure Act (APA), which is supposed to be for promulgating and changing formal regulations, not ephemeral (not to mention illegal) policy directives.

This week, the administration finally responded to the absurd SCOTUS ruling with a plan for coming up with a rescission order that won't give John Roberts any pretext for continuing to delay the termination of the program. In the meantime, the new DHS directive allows DACA to continue, though with no new applications, with a renewable duration of only one year from the current two years, and ending the practice of granting "advance parole" to DACAs (which facilitates the conversion of DACA's amnesty-lite to the amnesty-premium of a green card). In addition, DHS has proposed charging a fee for DACA renewals; currently there is no fee for DACA itself, only for the work permit and fingerprinting. This would raise the total cost of renewing DACA from $495 to $765 (which is still only about half of what it actually costs to process the package of DACA applications, meaning the rest is poached from fees paid by legal immigrants).

Some immigration hawks were disappointed that DHS isn't just pulling the plug on DACA immediately. The Heritage Foundation, for instance, said that "conservatives are right to be disappointed that DACA continues to live on." But as the OG Squeaky Wheel for ending DACA, I actually think the administration

is approaching this the only way it can. Since any new rescission order will receive a judicial colonoscopy, DHS needs to make sure to polish its every emanation and penumbra. None of that should be necessary for the simple rescission of a memo, but that's the hand that's been dealt.

Even if the new belt-and-suspenders rescission memo is issued before January 20, if Biden wins, his DHS secretary (Ilhan Omar may be looking for a job!) will simply rescind the rescission — and, needless to say, the #Resistance judiciary won't hold a Democratic administration to the same bogus APA standard as they have Trump.

Of course, Congress could rouse itself to do some legislating and give the DACAs green cards (something the president has supported, with conditions, for years), but I'm not holding my breath.

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MARK KRIKORIAN is the executive director of the Center for Immigration Studies.
@markskrikorian

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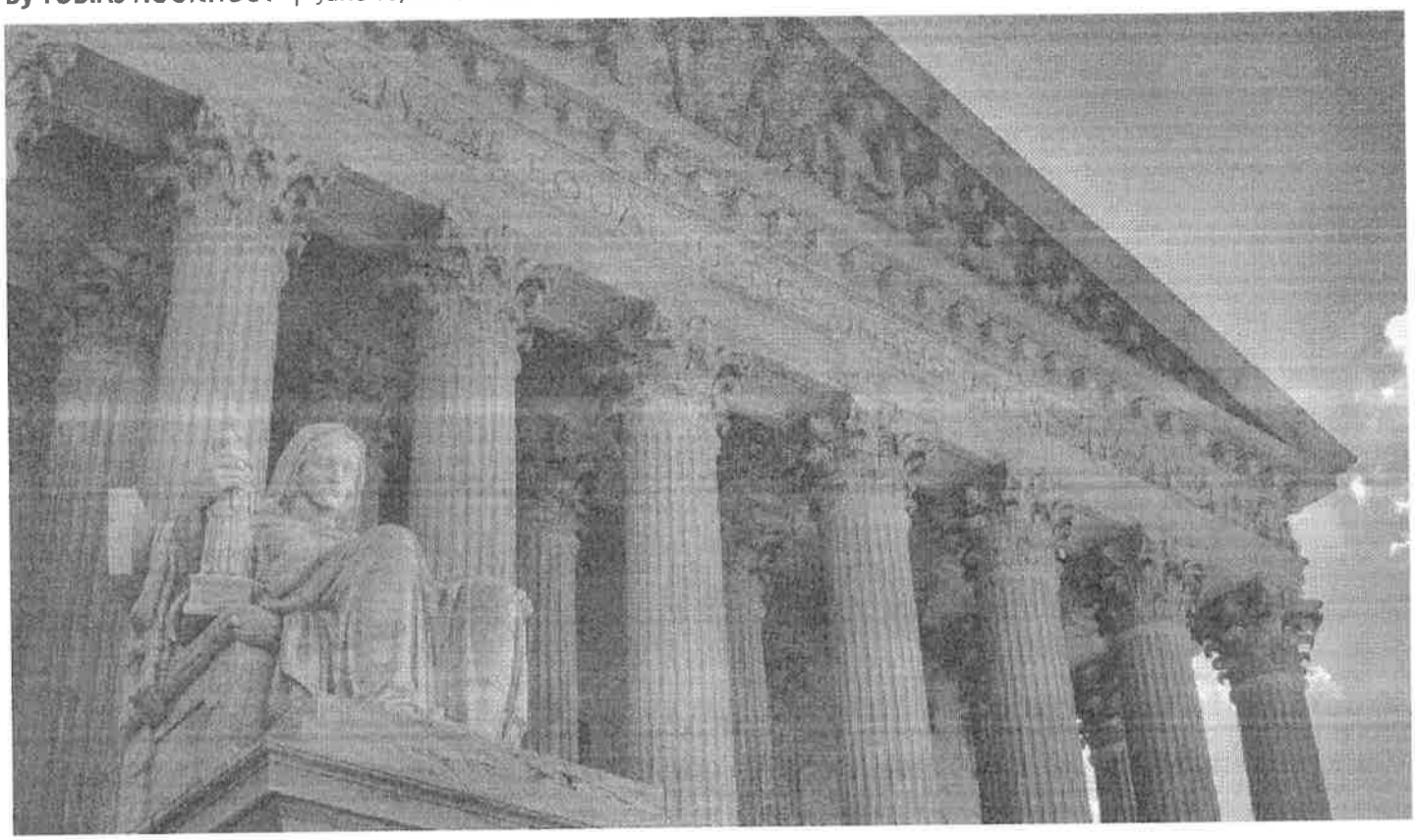
LAW & THE COURTS

SCOTUS Blocks Trump's Attempt to End DACA

By TOBIAS HOONHOUT | June 18, 2020 10:35 AM



(Bill Chizek/iStock/Getty Images Plus)

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The Supreme Court ruled Thursday that the Trump administration's attempt to end the Deferred Action for Childhood Arrivals program is "arbitrary and capricious" and cannot proceed.

Chief Justice John Roberts, joined by the four liberal judges, ruled that Trump's decision to rescind DACA violated the Administrative Procedure Act. DACA, which was instituted in 2012 by President Obama, allowed 700,000 illegal aliens who were brought to the United States as children to apply for a two-year deportation deferral. The deferral, which comes with work eligibility, may be renewed, but does not provide a path to citizenship.

"Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients," the court wrote, declining to rule on the legality of DACA itself. "That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew."

In dissent, Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, wrote that DACA was illegal from its inception.

"Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda," Thomas wrote. "Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a succcssor administration un- less the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration."

In his own dissent, Justice Brett Kavanaugh argued that the court was misapplying the APA's "arbitrary-and-capricious standard" by focusing only on a memorandum issued in 2017 by then-acting DHS secretary Elaine Duke,

rather than also analyzing a follow-up issued in 2018 by former DHS secretary Kirstjen Nielsen.

"The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA," Kavanaugh explained. "Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action."

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TOBIAS HOONHOUT is a media reporter for National Review Online. **@tjhoonhout**

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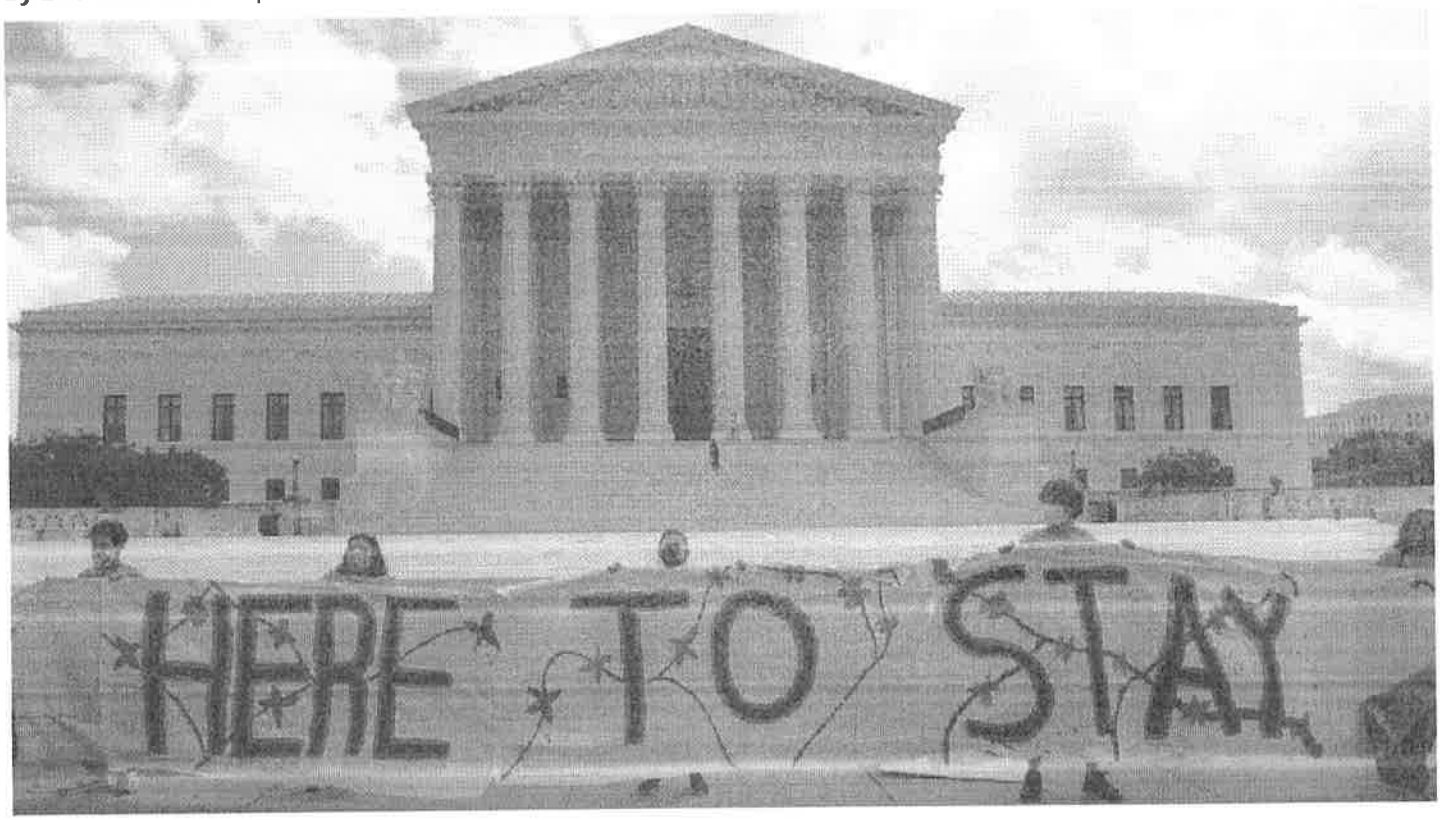
IMMIGRATION

Federal Judge Orders Trump Admin to Fully Reinstate DACA

By ZACHARY EVANS | December 5, 2020 9:37 AM



DACA recipients and their supporters celebrate outside the U.S. Supreme Court in Washington, D.C. June 18, 2020.
(Jonathan Ernst/Reuters)

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A federal judge ordered the Trump administration on Friday to accept new applications to the Deferred Action for Childhood Arrivals program.

Originally implemented by President Obama, DACA authorizes employment for illegal immigrants brought to the U.S. as children, and shields them from deportation provided they continue to renew their status every two years. The program has allowed roughly 700,000 immigrants to remain in the U.S. but does not provide a path to citizenship.

The Trump administration attempted to end DACA, however the effort was stopped in July by the Supreme Court, which ruled 5–4 that the administration violated the Administrative Procedure Act in attempting to halt the program. The Court did not rule on the legality of DACA itself.

Shortly following the decision, the Department of Homeland Security ceased new applications to the program and mandated that all DACA participants (known as "dreamers") renew their status every year instead of two years.

On Friday, Judge Nicholas Garaufis of the Eastern District of New York ordered the Trump administration to accept new applicants and increase the renewal period to the original two years, vacating a DHS order by acting Homeland Security secretary Chad Wolf. Around 300,000 people could now be eligible to apply to DACA, according to lawyers working on the case.

"Dreamers have fought so hard for justice. For the second time, a court has ordered the administration to resume processing DACA applications. It's time to do the right thing," Jennifer Molina, a spokesperson for incoming president Joe Biden's transition team, told the Associated Press. "On day one, President-elect Biden will ensure Dreamers and their families have the opportunity to live their lives free of fear and continue to contribute to our country."

The order follows a November ruling by Garaufis in which he deemed Wolf's appointment as acting head of DHS illegal.

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Ex-Clinton adviser Naomi Wolf warns US becoming 'totalitarian state before our eyes' under Biden

Author tells 'Tucker Carlson Tonight' Americans must wake up before it is 'too dangerous to fight back'

By **Yael Halon | Fox News**

Naomi Wolf sounds alarm at growing power of 'autocratic tyrants'

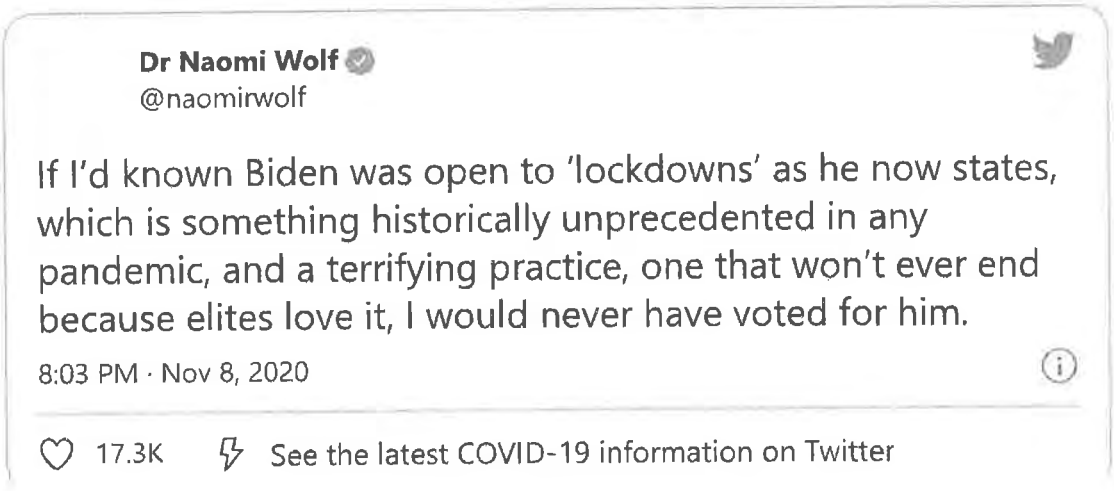
Author and former Clinton adviser warns U.S. about to become 'police state' on 'Tucker'

America is becoming a "totalitarian state before our eyes" under President Biden's leadership, feminist author and former Democratic adviser Naomi Wolf told "Tucker Carlson Tonight" Monday.

Wolf, who served as an adviser on Bill Clinton's reelection campaign in 1996, told host Tucker Carlson that in her view, the United States is swiftly "moving into a coup situation, a police state" as a result of Biden's ongoing coronavirus-related economic shutdowns. Wolf added that she believes the orders are being improperly extended under the "guise of a real medical pandemic."

"That is not a partisan thing," Wolf told Carlson. "That transcends everything that you and I might disagree or agree on. That should bring together left and right to protect our Constitution."

Wolf has ramped up her warnings against extended lockdowns on Twitter in recent months. In November, the author wrote on Twitter that Biden's openness to reinstating additional shutdowns made her question her decision to vote for him.



"The state has now crushed businesses, kept us from gathering in free assembly to worship as the First Amendment provides, is invading our bodies ... which is a violation of the Fourth Amendment, restricting movement, fining us in New York state ... the violations go on and on," she said.

The outspoken liberal, who previously authored a book outlining the ten steps that "would-be tyrants always take when they want to close down a democracy," believes the United States is heading toward what she refers to as "step 10."

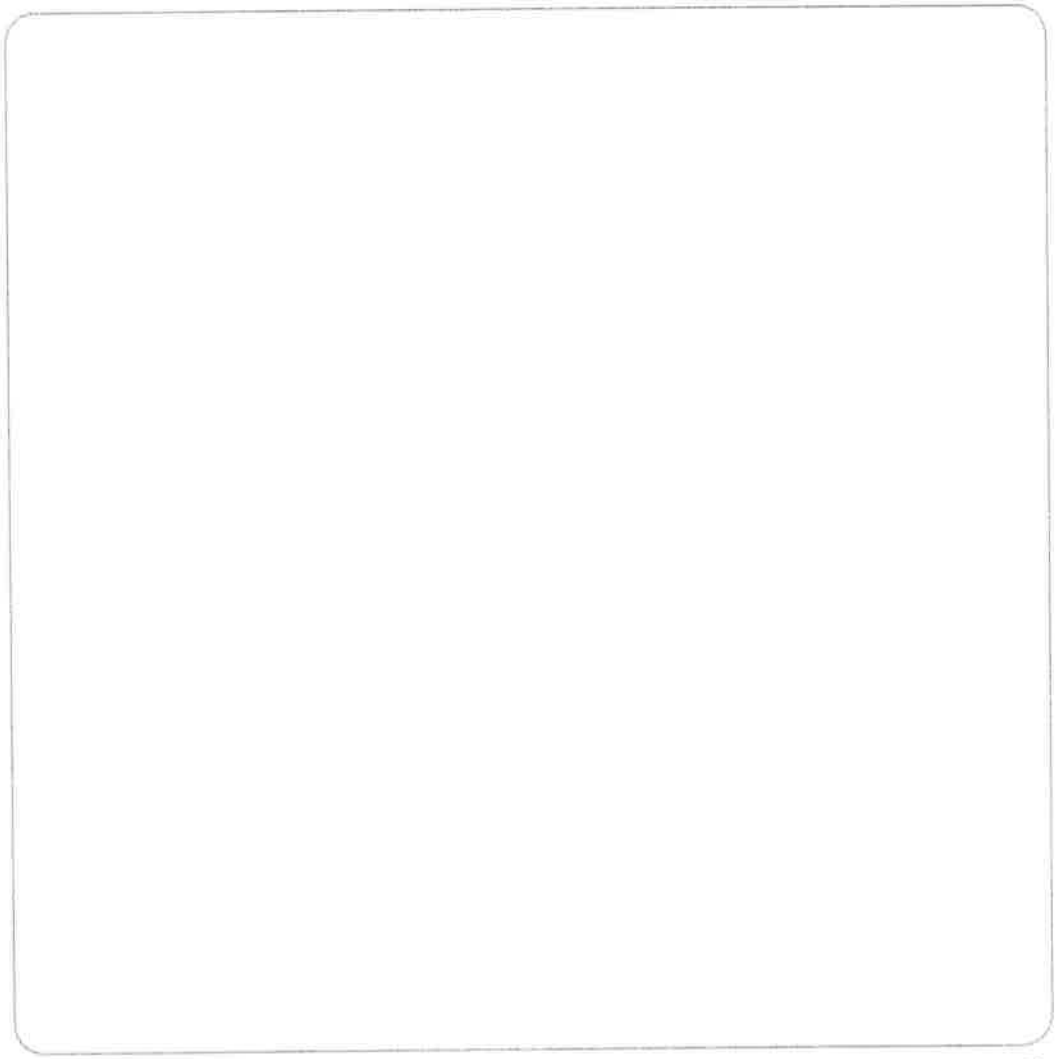
"Whether they are on the left or the right, they do these same ten things," Wolf explained, "and now we're at something I never thought I would see in my lifetime ... it is step 10 and that is the suspension of the rule of law and that is when you start to be a police state, and we're here. There is no way around it."

Wolf said she has interviewed U.S. citizens of various backgrounds and political affiliations who are in a state of "shock and horror" as "autocratic tyrants at the state and now the national level are

creating this kind of merger of corporate power and government power, which is really characteristic of totalism fascism in the '20's," she told Carlson.

Dr Naomi Wolf
@naomirwolf

Don't arrest us!!! We're at the Chief Martindale diner, another fab Airstream, this one from 1958. @BrianOSheaSPI had the smothered steak, I had the baked ham special. Dangerous! Illicit! Living on the extreme edge of human daring.



2:27 PM · Feb 22, 2021

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"They are using that to engage in emergency orders that simply strip us of our rights; rights to property, rights to assembly, rights to worship, all the rights the Constitution guarantees."

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Wolf called the United State's overall response to the coronavirus pandemic "completely unprecedented," arguing that "lockdowns have never been done in society and really, we are turning into a of totalitarian state before everyone's eyes."

"I really hope we wake up quickly," she said, "because history also shows that it's a small window in which people can fight back before it is too dangerous to fight back."

Yael Halon is a reporter for Fox News.

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Opinion

Fascist America, in 10 easy steps

Naomi Wolf

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Last autumn, there was a military coup in Thailand. The leaders of the coup took a number of steps, rather systematically, as if they had a shopping list. In a sense, they did. Within a matter of days, democracy had been closed down: the coup leaders declared martial law, sent armed soldiers into residential areas, took over radio and TV stations, issued restrictions on the press, tightened some limits on travel, and took certain activists into custody.

They were not figuring these things out as they went along. If you look at history, you can see that there is essentially a blueprint for turning an open society into a dictatorship. That blueprint has been used again and again in more and less bloody, more and less terrifying ways. But it is always effective. It is very difficult and arduous to create and sustain a democracy - but history shows that closing one down is much simpler. You simply have to be willing to take the 10 steps.

As difficult as this is to contemplate, it is clear, if you are willing to look, that each of these 10 steps has already been initiated today in the United States by the Bush administration.

Because Americans like me were born in freedom, we have a hard time even considering that it is possible for us to become as unfree - domestically - as many other nations. Because we no longer learn much about our rights or our system of government - the task of being aware of the constitution has been outsourced from

citizens' ownership to being the domain of professionals such as lawyers and professors - we scarcely recognise the checks and balances that the founders put in place, even as they are being systematically dismantled. Because we don't learn much about European history, the setting up of a department of "homeland" security - remember who else was keen on the word "homeland" - didn't raise the alarm bells it might have.

It is my argument that, beneath our very noses, George Bush and his administration are using time-tested tactics to close down an open society. It is time for us to be willing to think the unthinkable - as the author and political journalist Joe Conason, has put it, that it can happen here. And that we are further along than we realise.

Conason eloquently warned of the danger of American authoritarianism. I am arguing that we need also to look at the lessons of European and other kinds of fascism to understand the potential seriousness of the events we see unfolding in the US.

1. Invoke a terrifying internal and external enemy

After we were hit on September 11 2001, we were in a state of national shock. Less than six weeks later, on October 26 2001, the USA Patriot Act was passed by a Congress that had little chance to debate it; many said that they scarcely had time to read it. We were told we were now on a "war footing"; we were in a "global war" against a "global caliphate" intending to "wipe out civilisation". There have been other times of crisis in which the US accepted limits on civil liberties, such as during the civil war, when Lincoln declared martial law, and the second world war, when thousands of Japanese-American citizens were interned. But this situation, as Bruce Fein of the American Freedom Agenda notes, is unprecedented: all our other wars had an endpoint, so the pendulum was able to swing back toward freedom; this war is defined as open-ended in time and without national boundaries in space - the globe itself is the battlefield. "This time," Fein says, "there will be no defined end."

Creating a terrifying threat - hydra-like, secretive, evil - is an old trick. It can, like Hitler's invocation of a communist threat to the nation's security, be based on actual events (one Wisconsin academic has faced calls for his dismissal because he noted, among other things, that the alleged communist arson, the Reichstag fire of February 1933, was swiftly followed in Nazi Germany by passage of the Enabling Act, which replaced constitutional law with an open-ended state of emergency). Or the terrifying threat can be based, like the National Socialist evocation of the "global conspiracy of world Jewry", on myth.

It is not that global Islamist terrorism is not a severe danger; of course it is. I am arguing rather that the language used to convey the nature of the threat is different in a country such as Spain - which has also suffered violent terrorist attacks - than it is in America. Spanish citizens know that they face a grave security threat; what we as American citizens believe is that we are potentially threatened with the end of civilisation as we know it. Of course, this makes us more willing to accept restrictions on our freedoms.

2. Create a gulag

Once you have got everyone scared, the next step is to create a prison system outside the rule of law (as Bush put it, he wanted the American detention centre at Guantánamo Bay to be situated in legal "outer space") - where torture takes place.

At first, the people who are sent there are seen by citizens as outsiders: troublemakers, spies, "enemies of the people" or "criminals". Initially, citizens tend to support the secret prison system; it makes them feel safer and they do not identify with the prisoners. But soon enough, civil society leaders - opposition members, labour activists, clergy and journalists - are arrested and sent there as well.

This process took place in fascist shifts or anti-democracy crackdowns ranging from Italy and Germany in the 1920s and 1930s to the Latin American coups of the 1970s and beyond. It is standard practice for closing down an open society or crushing a pro-democracy uprising.

With its jails in Iraq and Afghanistan, and, of course, Guantánamo in Cuba, where detainees are abused, and kept indefinitely without trial and without access to the due process of the law, America certainly has its gulag now. Bush and his allies in Congress recently announced they would issue no information about the secret CIA "black site" prisons throughout the world, which are used to incarcerate people who have been seized off the street.

Gulags in history tend to metastasise, becoming ever larger and more secretive, ever more deadly and formalised. We know from first-hand accounts, photographs, videos and government documents that people, innocent and guilty, have been tortured in the US-run prisons we are aware of and those we can't investigate adequately.

But Americans still assume this system and detainee abuses involve only scary brown people with whom they don't generally identify. It was brave of the conservative pundit William Safire to quote the anti-Nazi pastor Martin Niemöller, who had been seized as a political prisoner: "First they came for the Jews." Most Americans don't understand yet that the destruction of the rule of law at Guantánamo set a dangerous

precedent for them, too.

By the way, the establishment of military tribunals that deny prisoners due process tends to come early on in a fascist shift. Mussolini and Stalin set up such tribunals. On April 24 1934, the Nazis, too, set up the People's Court, which also bypassed the judicial system: prisoners were held indefinitely, often in isolation, and tortured, without being charged with offences, and were subjected to show trials. Eventually, the Special Courts became a parallel system that put pressure on the regular courts to abandon the rule of law in favour of Nazi ideology when making decisions.

3. Develop a thug caste

When leaders who seek what I call a "fascist shift" want to close down an open society, they send paramilitary groups of scary young men out to terrorise citizens. The Blackshirts roamed the Italian countryside beating up communists; the Brownshirts staged violent rallies throughout Germany. This paramilitary force is especially important in a democracy: you need citizens to fear thug violence and so you need thugs who are free from prosecution.

The years following 9/11 have proved a bonanza for America's security contractors, with the Bush administration outsourcing areas of work that traditionally fell to the US military. In the process, contracts worth hundreds of millions of dollars have been issued for security work by mercenaries at home and abroad. In Iraq, some of these contract operatives have been accused of involvement in torturing prisoners, harassing journalists and firing on Iraqi civilians. Under Order 17, issued to regulate contractors in Iraq by the one-time US administrator in Baghdad, Paul Bremer, these contractors are immune from prosecution

Yes, but that is in Iraq, you could argue; however, after Hurricane Katrina, the Department of Homeland Security hired and deployed hundreds of armed private security guards in New Orleans. The investigative journalist Jeremy Scahill interviewed one unnamed guard who reported having fired on unarmed civilians in the city. It was a natural disaster that underlay that episode - but the administration's endless war on terror means ongoing scope for what are in effect privately contracted armies to take on crisis and emergency management at home in US cities.

Thugs in America? Groups of angry young Republican men, dressed in identical shirts and trousers, menaced poll workers counting the votes in Florida in 2000. If you are reading history, you can imagine that there can be a need for "public order" on the next election day. Say there are protests, or a threat, on the day of an election: history would

election day. Say there are protests, or a threat, on the day of an election, history would not rule out the presence of a private security firm at a polling station "to restore public order".

4. Set up an internal surveillance system

In Mussolini's Italy, in Nazi Germany, in communist East Germany, in communist China - in every closed society - secret police spy on ordinary people and encourage neighbours to spy on neighbours. The Stasi needed to keep only a minority of East Germans under surveillance to convince a majority that they themselves were being watched.

In 2005 and 2006, when James Risen and Eric Lichtblau wrote in the New York Times about a secret state programme to wiretap citizens' phones, read their emails and follow international financial transactions, it became clear to ordinary Americans that they, too, could be under state scrutiny.

In closed societies, this surveillance is cast as being about "national security"; the true function is to keep citizens docile and inhibit their activism and dissent.

5. Harass citizens' groups

The fifth thing you do is related to step four - you infiltrate and harass citizens' groups. It can be trivial: a church in Pasadena, whose minister preached that Jesus was in favour of peace, found itself being investigated by the Internal Revenue Service, while churches that got Republicans out to vote, which is equally illegal under US tax law, have been left alone.

Other harassment is more serious: the American Civil Liberties Union reports that thousands of ordinary American anti-war, environmental and other groups have been infiltrated by agents: a secret Pentagon database includes more than four dozen peaceful anti-war meetings, rallies or marches by American citizens in its category of 1,500 "suspicious incidents". The equally secret Counterintelligence Field Activity (Cifa) agency of the Department of Defense has been gathering information about domestic organisations engaged in peaceful political activities: Cifa is supposed to track "potential terrorist threats" as it watches ordinary US citizen activists. A little-noticed new law has redefined activism such as animal rights protests as "terrorism". So the definition of "terrorist" slowly expands to include the opposition.

6. Engage in arbitrary detention and release

This scares people. It is a kind of cat-and-mouse game. Nicholas D Kristof and Sheryl WuDunn, the investigative reporters who wrote China Wakes: the Struggle for the Soul

of a Rising Power, describe pro-democracy activists in China, such as Wei Jingsheng, being arrested and released many times. In a closing or closed society there is a "list" of dissidents and opposition leaders: you are targeted in this way once you are on the list, and it is hard to get off the list.

In 2004, America's Transportation Security Administration confirmed that it had a list of passengers who were targeted for security searches or worse if they tried to fly. People who have found themselves on the list? Two middle-aged women peace activists in San Francisco; liberal Senator Edward Kennedy; a member of Venezuela's government - after Venezuela's president had criticised Bush; and thousands of ordinary US citizens.

Professor Walter F Murphy is emeritus of Princeton University; he is one of the foremost constitutional scholars in the nation and author of the classic Constitutional Democracy. Murphy is also a decorated former marine, and he is not even especially politically liberal. But on March 1 this year, he was denied a boarding pass at Newark, "because I was on the Terrorist Watch list".

"Have you been in any peace marches? We ban a lot of people from flying because of that," asked the airline employee.

"I explained," said Murphy, "that I had not so marched but had, in September 2006, given a lecture at Princeton, televised and put on the web, highly critical of George Bush for his many violations of the constitution."

"That'll do it," the man said.

Anti-war marcher? Potential terrorist. Support the constitution? Potential terrorist. History shows that the categories of "enemy of the people" tend to expand ever deeper into civil life.

James Yee, a US citizen, was the Muslim chaplain at Guantánamo who was accused of mishandling classified documents. He was harassed by the US military before the charges against him were dropped. Yee has been detained and released several times. He is still of interest.

Brandon Mayfield, a US citizen and lawyer in Oregon, was mistakenly identified as a possible terrorist. His house was secretly broken into and his computer seized. Though he is innocent of the accusation against him, he is still on the list.

It is a standard practice of fascist societies that once you are on the list, you can't get

off.

7. Target key individuals

Threaten civil servants, artists and academics with job loss if they don't toe the line. Mussolini went after the rectors of state universities who did not conform to the fascist line; so did Joseph Goebbels, who purged academics who were not pro-Nazi; so did Chile's Augusto Pinochet; so does the Chinese communist Politburo in punishing pro-democracy students and professors.

Academe is a tinderbox of activism, so those seeking a fascist shift punish academics and students with professional loss if they do not "coordinate", in Goebbels' term, ideologically. Since civil servants are the sector of society most vulnerable to being

fired by a given regime, they are also a group that fascists typically "coordinate" early on: the Reich Law for the Re-establishment of a Professional Civil Service was passed on April 7 1933.

Bush supporters in state legislatures in several states put pressure on regents at state universities to penalise or fire academics who have been critical of the administration. As for civil servants, the Bush administration has derailed the career of one military lawyer who spoke up for fair trials for detainees, while an administration official publicly intimidated the law firms that represent detainees pro bono by threatening to call for their major corporate clients to boycott them.

Elsewhere, a CIA contract worker who said in a closed blog that "waterboarding is torture" was stripped of the security clearance she needed in order to do her job.

Most recently, the administration purged eight US attorneys for what looks like insufficient political loyalty. When Goebbels purged the civil service in April 1933, attorneys were "coordinated" too, a step that eased the way of the increasingly brutal laws to follow.

8. Control the press

Italy in the 1920s, Germany in the 30s, East Germany in the 50s, Czechoslovakia in the 60s, the Latin American dictatorships in the 70s, China in the 80s and 90s - all dictatorships and would-be dictators target newspapers and journalists. They threaten and harass them in more open societies that they are seeking to close, and they arrest them and worse in societies that have been closed already.

The Committee to Protect Journalists says arrests of US journalists are at an all-time high: Josh Wolf (no relation), a blogger in San Francisco, has been put in jail for a year

[illegible] for refusing to turn over video of an anti-war demonstration; Homeland Security brought a criminal complaint against reporter Greg Palast, claiming he threatened "critical infrastructure" when he and a TV producer were filming victims of Hurricane Katrina in Louisiana. Palast had written a bestseller critical of the Bush administration.

Other reporters and writers have been punished in other ways. Joseph C Wilson accused Bush, in a New York Times op-ed, of leading the country to war on the basis of a false charge that Saddam Hussein had acquired yellowcake uranium in Niger. His wife, Valerie Plame, was outed as a CIA spy - a form of retaliation that ended her career.

Prosecution and job loss are nothing, though, compared with how the US is treating journalists seeking to cover the conflict in Iraq in an unbiased way. The Committee to Protect Journalists has documented multiple accounts of the US military in Iraq firing upon or threatening to fire upon unembedded (meaning independent) reporters and camera operators from organisations ranging from al-Jazeera to the BBC. While westerners may question the accounts by al-Jazeera, they should pay attention to the accounts of reporters such as the BBC's Kate Adie. In some cases reporters have been wounded or killed, including ITN's Terry Lloyd in 2003. Both CBS and the Associated Press in Iraq had staff members seized by the US military and taken to violent prisons; the news organisations were unable to see the evidence against their staffers.

Over time in closing societies, real news is supplanted by fake news and false documents. Pinochet showed Chilean citizens falsified documents to back up his claim that terrorists had been about to attack the nation. The yellowcake charge, too, was based on forged papers.

You won't have a shutdown of news in modern America - it is not possible. But you can have, as Frank Rich and Sidney Blumenthal have pointed out, a steady stream of lies polluting the news well. What you already have is a White House directing a stream of false information that is so relentless that it is increasingly hard to sort out truth from untruth. In a fascist system, it's not the lies that count but the muddying. When citizens can't tell real news from fake, they give up their demands for accountability bit by bit.

9. Dissent equals treason

Cast dissent as "treason" and criticism as "espionage'. Every closing society does this, just as it elaborates laws that increasingly criminalise certain kinds of speech and expand the definition of "spy" and "traitor". When Bill Keller, the publisher of the New York Times, ran the Lichtblau/Risen stories, Bush called the Times' leaking of classified information "disgraceful", while Republicans in Congress called for Keller to be charged

with treason, and rightwing commentators and news outlets kept up the "treason" drumbeat. Some commentators, as Conason noted, reminded readers smugly that one penalty for violating the Espionage Act is execution.

Conason is right to note how serious a threat that attack represented. It is also important to recall that the 1938 Moscow show trial accused the editor of Izvestia, Nikolai Bukharin, of treason; Bukharin was, in fact, executed. And it is important to remind Americans that when the 1917 Espionage Act was last widely invoked, during the infamous 1919 Palmer Raids, leftist activists were arrested without warrants in sweeping roundups, kept in jail for up to five months, and "beaten, starved, suffocated, tortured and threatened with death", according to the historian Myra MacPherson. After that, dissent was muted in America for a decade.

In Stalin's Soviet Union, dissidents were "enemies of the people". National Socialists called those who supported Weimar democracy "November traitors".

And here is where the circle closes: most Americans do not realise that since September of last year - when Congress wrongly, foolishly, passed the Military Commissions Act of 2006 - the president has the power to call any US citizen an "enemy combatant". He has the power to define what "enemy combatant" means. The president can also delegate to anyone he chooses in the executive branch the right to define "enemy combatant" any way he or she wants and then seize Americans accordingly.

Even if you or I are American citizens, even if we turn out to be completely innocent of what he has accused us of doing, he has the power to have us seized as we are changing planes at Newark tomorrow, or have us taken with a knock on the door; ship you or me to a navy brig; and keep you or me in isolation, possibly for months, while awaiting trial. (Prolonged isolation, as psychiatrists know, triggers psychosis in otherwise mentally healthy prisoners. That is why Stalin's gulag had an isolation cell, like Guantánamo's, in every satellite prison. Camp 6, the newest, most brutal facility at Guantánamo, is all isolation cells.)

We US citizens will get a trial eventually - for now. But legal rights activists at the Center for Constitutional Rights say that the Bush administration is trying increasingly aggressively to find ways to get around giving even US citizens fair trials. "Enemy combatant" is a status offence - it is not even something you have to have done. "We have absolutely moved over into a preventive detention model - you look like you could do something bad, you might do something bad, so we're going to hold you," says a spokeswoman of the CCR.

Most Americans surely do not get this yet. No wonder: it is hard to believe, even though it is true. In every closing society, at a certain point there are some high-profile arrests - usually of opposition leaders, clergy and journalists. Then everything goes quiet. After those arrests, there are still newspapers, courts, TV and radio, and the facades of a civil society. There just isn't real dissent. There just isn't freedom. If you look at history, just before those arrests is where we are now.

10. Suspend the rule of law

The John Warner Defense Authorization Act of 2007 gave the president new powers over the national guard. This means that in a national emergency - which the president now has enhanced powers to declare - he can send Michigan's militia to enforce a state

of emergency that he has declared in Oregon, over the objections of the state's governor and its citizens.

Even as Americans were focused on Britney Spears's meltdown and the question of who fathered Anna Nicole's baby, the New York Times editorialised about this shift: "A disturbing recent phenomenon in Washington is that laws that strike to the heart of American democracy have been passed in the dead of night ... Beyond actual insurrection, the president may now use military troops as a domestic police force in response to a natural disaster, a disease outbreak, terrorist attack or any 'other condition'."

Critics see this as a clear violation of the Posse Comitatus Act - which was meant to restrain the federal government from using the military for domestic law enforcement. The Democratic senator Patrick Leahy says the bill encourages a president to declare federal martial law. It also violates the very reason the founders set up our system of government as they did: having seen citizens bullied by a monarch's soldiers, the founders were terrified of exactly this kind of concentration of militias' power over American people in the hands of an oppressive executive or faction.

Of course, the United States is not vulnerable to the violent, total closing-down of the system that followed Mussolini's march on Rome or Hitler's roundup of political prisoners. Our democratic habits are too resilient, and our military and judiciary too independent, for any kind of scenario like that.

Rather, as other critics are noting, our experiment in democracy could be closed down by a process of erosion.

It is a mistake to think that early in a fascist shift you see the profile of barbed wire

against the sky. In the early days, things look normal on the surface; peasants were celebrating harvest festivals in Calabria in 1922; people were shopping and going to the movies in Berlin in 1931. Early on, as WH Auden put it, the horror is always elsewhere - while someone is being tortured, children are skating, ships are sailing: "dogs go on with their doggy life ... How everything turns away/ Quite leisurely from the disaster."

As Americans turn away quite leisurely, keeping tuned to internet shopping and American Idol, the foundations of democracy are being fatally corroded. Something has changed profoundly that weakens us unprecedentedly: our democratic traditions, independent judiciary and free press do their work today in a context in which we are "at war" in a "long war" - a war without end, on a battlefield described as the globe, in a context that gives the president - without US citizens realising it yet - the power over US citizens of freedom or long solitary incarceration, on his say-so alone.

That means a hollowness has been expanding under the foundation of all these still-free-looking institutions - and this foundation can give way under certain kinds of pressure. To prevent such an outcome, we have to think about the "what ifs".

What if, in a year and a half, there is another attack - say, God forbid, a dirty bomb? The executive can declare a state of emergency. History shows that any leader, of any party, will be tempted to maintain emergency powers after the crisis has passed. With the gutting of traditional checks and balances, we are no less endangered by a President Hillary than by a President Giuliani - because any executive will be tempted to enforce his or her will through edict rather than the arduous, uncertain process of democratic negotiation and compromise.

What if the publisher of a major US newspaper were charged with treason or espionage, as a rightwing effort seemed to threaten Keller with last year? What if he or she got 10 years in jail? What would the newspapers look like the next day? Judging from history, they would not cease publishing; but they would suddenly be very polite.

Right now, only a handful of patriots are trying to hold back the tide of tyranny for the rest of us - staff at the Center for Constitutional Rights, who faced death threats for representing the detainees yet persisted all the way to the Supreme Court; activists at the American Civil Liberties Union; and prominent conservatives trying to roll back the corrosive new laws, under the banner of a new group called the American Freedom Agenda. This small, disparate collection of people needs everybody's help, including that of Europeans and others internationally who are willing to put pressure on the administration because they can see what a US unrestrained by real democracy at home can mean for the rest of the world.

We need to look at history and face the "what ifs". For if we keep going down this road,

the "end of America" could come for each of us in a different way, at a different moment; each of us might have a different moment when we feel forced to look back and think: that is how it was before - and this is the way it is now.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... is the definition of tyranny," wrote James Madison. We still have the choice to stop going down this road; we can stand our ground and fight for our nation, and take up the banner the founders asked us to carry.

· Naomi Wolf's The End of America: A Letter of Warning to a Young Patriot will be published by Chelsea Green in September.

WIKIPEDIA

Naomi Wolf

Naomi R. Wolf (born November 12, 1962)[2][3][4] is an American liberal[5][6] feminist author, journalist and former political advisor to Al Gore and Bill Clinton. Following her first book *The Beauty Myth* (1991),[7] she became a leading spokeswoman of what has been described as the third wave of the feminist movement.[8] Feminists including Gloria Steinem and Betty Friedan praised the work; others, including Camille Paglia and Christina Hoff Sommers, criticized it. Her later books include the bestseller *The End of America* in 2007 and *Vagina: A New Biography*. Critics have challenged the quality and accuracy of the scholarship in her books, including *Outrages* (2019). In the case of the latter, her serious misreading of court records led to the book's publication in the US being cancelled.[9]

Her career in journalism began in 1995 and has included topics such as abortion and the Occupy Wall Street movement in articles for media outlets such as *The Nation*, *The New Republic*, *The Guardian* and *The Huffington Post*. She has received criticism for promoting misinformation and conspiracy theories on several topics, such as beheadings carried out by ISIS, Edward Snowden and the Western African Ebola virus epidemic.[10][11][12][13]

Contents

Naomi Wolf

Wolf at the 2012 Texas Book Festival, Austin, Texas

Born	November 12, 1962 San Francisco, California, US
Occupation	Author, Journalist, Activist, Public Speaker, Business Owner
Alma mater	Yale University New College, Oxford
Notable works	*The Beauty Myth* *The End of America* *Misconceptions* *Fire with Fire* *Outrages*
Spouse	David Shipley (m. 1993; div. 2005) Brian O'Shea (m. 2018)[1]
Children	2
Website	
dailyclout.io (https://dailyclout.io)	

Childhood and education

Wolf was born in San Francisco, to a Jewish family.[14][15] Her mother is Deborah Goleman Wolf, an anthropologist and the author of *The Lesbian Community*.[8] Her father was Leonard Wolf, a Romanian-born gothic horror scholar at University of California, Berkeley and Yiddish translator. Leonard Wolf died from advanced Parkinson's Disease on March 20, 2019.[16] Wolf has a brother, Aaron, and a half-brother, Julius, from her father's earlier relationship; it remained his secret until his daughter was in her 30s.[17] She attended Lowell High School and debated in regional speech tournaments as a member of the Lowell Forensic Society.

Wolf attended Yale University receiving her Bachelor of Arts in English literature in 1984. From 1985 to 1987, she was a Rhodes Scholar at New College, Oxford.[18] Her initial period at Oxford University was difficult for Wolf as she experienced "raw sexism, overt snobbery and casual antisemitism". Her writing became so personal and subjective that her tutor advised against submitting her doctoral thesis. Wolf told interviewer Rachel Cooke, writing for *The Observer*, in 2019: "My subject didn't exist. I wanted to write feminist theory, and I kept being told by the dons there was no such thing." Her feminist writing at this time formed the basis of her first book, *The Beauty Myth*.[6][19]

Wolf ultimately returned to Oxford, completing her Doctor of Philosophy degree in English literature in 2015. Her thesis, supervised by Dr. Stefano Evangelista of Trinity College,[20] formed the basis for her 2019 book *Outrages: Sex, Censorship, and the Criminalization of Love*.[21]

Political consultant

Wolf was involved in Bill Clinton's 1996 re-election bid, brainstorming with the president's team about ways to reach female voters.[22] During Al Gore's bid for the presidency in the 2000 election, Wolf was hired to work as a consultant. Wolf's ideas and participation in the Gore campaign generated considerable media coverage and criticism.[23] According to a report by Michael Duffy in *Time*, Wolf was paid a salary of $15,000 (by November 1999, $5,000) per month[24] "in exchange for advice on

everything from how to win the women's vote to shirt-and-tie combinations." This article was the original source of the assertion that Wolf was responsible for Gore's "three-buttoned, earth-toned look."[22][25]

In an interview with Melinda Henneberger in *The New York Times*, Wolf said she had been appointed in January 1999 and denied having advised Gore on his wardrobe. Wolf said she had mentioned the term "alpha male" only once in passing and that "[it] was just a truism, something the pundits had been saying for months, that the vice president is in a supportive role and the President is in an initiatory role ... I used those terms as shorthand in talking about the difference in their job descriptions".[24]

Works

The Beauty Myth (1991)


Naomi Wolf speaking at Brooklyn Law School, January 29, 2009

In 1991, Wolf gained international attention as a spokeswoman of third-wave feminism[26][27] from the publication of her first book *The Beauty Myth*, an international bestseller. It was named "one of the seventy most influential books of the twentieth century" by *The New York Times*.[18][28] She argues that "beauty" as a normative value is entirely socially constructed, and that the patriarchy determines the content of that construction with the objective of maintaining women's subjugation.[29]

Wolf posits the idea of an "iron-maiden", an intrinsically unattainable standard that is then used to punish women physically and psychologically for their failure to achieve and conform to it. Wolf criticized the fashion and beauty industries as exploitative of women, but added that the beauty myth extended into all areas of human functioning. Wolf writes that women should have "the choice to do whatever we want with our faces and bodies without being punished by an ideology that is using attitudes, economic pressure, and even legal judgments regarding women's appearance to undermine us psychologically and politically". Wolf argues that women were under assault by the "beauty myth" in five areas: work, religion, sex, violence, and hunger. Ultimately, Wolf argues for a relaxation of normative standards of beauty.[30] In her introduction, Wolf positioned her argument against the concerns of second-wave feminists and offered the following analysis:

> The more legal and material hindrances women have broken through, the more strictly and heavily and cruelly images of female beauty have come to weigh upon us ... [D]uring the past decade, women breached the power structure; meanwhile, eating disorders rose exponentially and cosmetic surgery became the fastest-growing specialty ... [P]ornography became the main media category, ahead of legitimate films and records combined, and thirty-three thousand American women told researchers that they would rather lose ten to fifteen pounds than achieve any other goal ... More women have more money and power and scope and legal recognition than we have ever had before; but in terms of how we feel about ourselves physically, we may actually be worse off than our unliberated grandmothers.[31]

Accuracy

Christina Hoff Sommers criticized Wolf for publishing the estimate that 150,000 women were dying every year from anorexia. Sommers states that she tracked down the source to the American Anorexia and Bulimia Association who stated that they were misquoted; the figure refers to sufferers, not fatalities. Wolf's citation for the incorrect figure came from a book by Brumberg, who referred to an American Anorexia and Bulimia Association newsletter and misquoted the newsletter. Wolf accepted the error and changed it in future editions. Sommers gave an estimate for the number of fatalities in 1990 as 100–400.[32][33] The annual anorexia casualties in the US were estimated to be around 50 to 60 per year in the mid-1990s.[34] In 1995, for an article in *The Independent on Sunday*, British journalist Joan Smith recalled asking Wolf to explain her unsourced assertion in *The Beauty Myth* that the UK "has 3.5 million anorexics or bulimics (95 per cent of them female), with 6,000 new cases yearly". Wolf replied, according to Smith, that she had calculated the statistics from patients with eating disorders at one clinic.[35]

Caspar Schoemaker of the Netherlands Trimbos Institute published a paper in the academic journal *Eating disorders* demonstrating that of the 23 statistics cited by Wolf in *Beauth Myth*, 18 were incorrect, with Wolf citing numbers that average out to 8 times the number in the source she was citing.[36] For example, Wolf wrote that 7.5% of girls and women have anexoria, the accurate figure is 0.065%.[37]

Reception

Although *The Beauty Myth* was a bestseller,[35] it received mixed responses from feminists and the media. Second-wave feminist Germaine Greer wrote that *The Beauty Myth* was "the most important feminist publication since *The Female Eunuch*", and Gloria Steinem wrote, "*The Beauty Myth* is a smart, angry, insightful book, and a clarion call to freedom. Every woman should read it."[38] British novelist Fay Weldon called the book "essential reading for the New Woman".[39] Betty Friedan wrote in *Allure* magazine that "*The Beauty Myth* and the controversy it is eliciting could be a hopeful sign of a new surge of feminist consciousness."

However, Camille Paglia, whose *Sexual Personae* was published in the same year as *The Beauty Myth*, derided Wolf as unable to perform "historical analysis", and called her education "completely removed from reality."[40] Her comments touched off a series of debates between Wolf and Paglia in the pages of *The New Republic*.[41][42][43]

In *The New York Times*, Caryn James lambasted the book as a "sloppily researched polemic as dismissible as a hackneyed adventure film ... Even by the standards of pop-cultural feminist studies, *The Beauty Myth* is a mess."[44] She called the statistics Wolf that cited "shamefully secondhand and outdated.[44] In contrast, *The Washington Post* called the book "persuasive" and praised its "accumulated evidence".[45]

Revisiting *Beauty Myth* in 2019 for *The New Republic*, literary critic Maris Kreizman recalls that reading it as an undergraduate made her "world burst open." It "remains one of the most formative books in (Kreizman's) life." However, as she matured, Kreizman saw Wolf's books as "poorly argued tracts" that made "wilder and wilder assertions." Kreizman "began to write (Wolf) off as a fringe character" despite the fact that she had "once informed my own feminism so deeply."[11]

Fire with Fire (1993)

In *Fire with Fire* (1993), Wolf writes on politics, female empowerment and women's sexual liberation.[46] *The New York Times* assailed the work for its "dubious oversimplifications and highly debatable assertions" and its "disconcerting penchant for inflationary prose," nonetheless approving of

Wolf's "efforts to articulate an accessible, pragmatic feminism, ... helping to replace strident dogma with common sense."[47] The *Time* magazine reviewer Martha Duffy dismissed the book as "flawed," although she commented that Wolf was "an engaging raconteur" who was also "savvy about the role of TV – especially the Thomas-Hill hearings and daytime talk shows – in radicalizing women, including homemakers." She characterized the book as advocating an inclusive strain of feminism that welcomed abortion opponents.[48] In the UK, feminist author Natasha Walter writing in *The Independent* said that the book "has its faults, but compared with *The Beauty Myth* it has energy and spirit, and generosity too." Walter, however, criticized it for having a "narrow agenda" where "you will look in vain for much discussion of older women, of black women, of women with low incomes, of mothers." Characterizing Wolf as a "media star", Walter wrote: "She is particularly good, naturally, on the role of women in the media."[49]

Promiscuities (1997)

Promiscuities (1997) reports on and analyzes the shifting patterns of contemporary adolescent sexuality. Wolf argues that literature is rife with examples of male coming-of-age stories, covered autobiographically by D. H. Lawrence, Tobias Wolff, J. D. Salinger and Ernest Hemingway, and covered misogynistically by Henry Miller, Philip Roth and Norman Mailer. Wolf insists, however, that female accounts of adolescent sexuality have been systematically suppressed. She adduces cross-cultural material to demonstrate that women have, across history, been celebrated as more carnal than men. Wolf also argues that women must reclaim the legitimacy of their own sexuality by shattering the polarization of women between virgin and whore.[50]

Promiscuities generally received negative reviews. In *The New York Times*, Michiko Kakutani called Wolf a "frustratingly inept messenger: a sloppy thinker and incompetent writer. She tries in vain to pass off tired observations as radical *aperçus*, subjective musings as generational truths, sappy suggestions as useful ideas".[51] However, two days earlier in the *Times* Sunday edition, Weaver Courtney praised the book: "Anyone—particularly anyone who, like Ms. Wolf, was born in the 1960s—will have a very hard time putting down *Promiscuities*. Told through a series of confessions, her book is a searing and thoroughly fascinating exploration of the complex wildlife of female sexuality and desire."[52] In contrast, *The Library Journal* excoriated the work, writing, "Overgeneralization abounds as she attempts to apply the microcosmic events of this mostly white, middle-class, liberal milieu to a whole generation. ... There is a desperate defensiveness in the tone of this book which diminishes the force of her argument."[53]

Misconceptions (2001)

Misconceptions (2001) examines pregnancy and childbirth. Most of the book is told through the prism of Wolf's personal experience of her first pregnancy.[54] She describes the "vacuous impassivity" of the ultrasound technician who gives her the first glimpse of her new baby. Wolf laments her C-section and examines why the procedure is commonplace in the United States, advocating a return to midwifery. The second half of the book is anecdotal, focusing on inequalities between parents to child care.[55] In the section describing being on the operating table having a caesarian, Wolf compares herself to Jesus at his Crucifixion.[56]

In her *New York Times* review, Claire Dederer suggested it was inappropriate to consider "Wolf as a political theorist, and instead call her a memoirist. She does her best writing when she's observing her own life." Her capability as a memoirist is not "self-indulgent. It seems vital, and in a sense radical, in the tradition of 1970's feminists who sought to speak to every aspect of women's lives."[54]

The Treehouse (2005)

Wolf's *The Treehouse: Eccentric Wisdom from My Father on How to Live, Love, and See* (2005) is an account of her midlife crisis. She revalues her father's love, and his role as an artist and a teacher during a year living in a house in upper New York state.[57]

In a promotional interview with *The Herald* (Glasgow), Wolf related her experience of a vision of Jesus: "just this figure who was the most perfected human being - full of light and full of love. ...There was light coming out of him holographically, simply because he was unclouded."[58]

The End of America (2007)

In *The End of America: Letter of Warning to a Young Patriot* (2007), Wolf takes a historical look at the rise of fascism, outlining 10 steps necessary for a fascist group (or government) to destroy the democratic character of a nation-state.[59] The book details how this pattern was implemented in Nazi Germany, Fascist Italy, and elsewhere, and analyzes its emergence and application of all the 10 steps in American political affairs since the September 11 attacks.[60][61] Alex Beam wrote in *The New York Times*: "In the book, Wolf insists that she is not equating [George W.] Bush with Hitler, nor the United States with Nazi Germany, then proceeds to do just that."[62]

Several years later, Mark Nuckols, argued in *The Atlantic* that Wolf's supposed historical parallels between incidents from the era of the European dictators and modern America are based on a highly selective reading in which Wolf omits significant details and misuses her sources.[63] For *The Daily Beast*, Michael Moynihan, characterized the book as "an astoundingly lazy piece of writing."[64]

The End of America was adapted for the screen as a documentary by filmmakers Annie Sundberg and Ricki Stern, best known for *The Devil Came on Horseback* and *The Trials of Darryl Hunt*. It premiered in October 2008, and was favorably reviewed in *The New York Times* by Stephen Holden[65] by *Variety* magazine.[66] Nigel Andrews in the *Financial Times* saw aspects of it positively, but "What isn't plausible or reality-related is the conclusion itself. At the door of the Third Reich, Wolf's credibility collapses."[67]

Wolf returned to this general theme in an article in 2014 considering how modern Western women, born in inclusive, egalitarian liberal democracies, are assuming positions of leadership in neofascist political movements.[68]

Give Me Liberty (2008)

Give Me Liberty: A Handbook for American Revolutionaries (2008) was written as a sequel to *The End of America: Letter of Warning to a Young Patriot*. In the book, Wolf looks at times and places in history where citizens were faced with the closing of an open society and successfully fought back.[69]

Vagina: A New Biography (2012)

Published in 2012 on the topic of the vagina, *Vagina: A New Biography* was much criticized, especially by feminist authors. Katie Roiphe described it as "ludicrous" in *Slate*: "I doubt the most brilliant novelist in the world could have created a more skewering satire of Naomi Wolf's career than her latest book."[56] In *The Nation*, Katha Pollitt considered it a "silly book" containing "much dubious neuroscience and much foolishness." It becomes "loopier as it goes on. We learn that women think and feel through their

vagina, which can 'grieve' and feel insulted."[70] Toni Bentley wrote in *The New York Times Book Review* that Wolf used "shoddy research methodology", while with "her graceless writing, Wolf opens herself to ridicule on virtually every page."[71] Janice Turner in *The Times* of London wrote that since Mary Wollstonecraft, female "writers have argued that women should not be defined by biology", yet "Wolf, our self-styled leader, has declared that female consciousness, creativity and destiny all come back" to a woman's genitals.[72]

In *The New York Review of Books*, Zoë Heller wrote that the book "offers an unusually clear insight into the workings of her mystic feminist philosophy". Part of the book concerns the history of the vagina's representation, but is "full of childlike generalizations" and her understanding of science "is pretty shaky too".[73] *Los Angeles Times* columnist Meghan Daum decried the book's "painful" writing and its "hoary ideas about how women think."[74] In *The New York Observer*, Nina Burleigh suggested that critics of the book were so vehement "because (a) their editors handed the book to them for review because they thought it was an Important Feminist Book when it's actually slight and (b) there's a grain of truth in what she's trying to say."[75]

In response to the criticism, Wolf stated in a television interview:

> [A]nything that shows documentation of the brain and vagina connection is going to alarm some feminists... . ..also feminism has kind of retreated into the academy and sort of embraced the idea that all gender is socially constructed and so here is a book that is actually looking at science ... though there has been some criticisms of the book from some feminists ... who say, well you can't look at the science because that means we have to grapple with the science ... to me the feminist task of creating a just world isn't changed at all by this fascinating neuroscience that shows some differences between men and women.[76]

At a party to celebrate the Wolf's publishing deal for this book, recounted in its pages, the male chef and host made pasta pieces shaped like a vulva, with sausages and salmon also on the menu. Perceiving the experience as a slight, Wolf apparently suffered writers' block for the next six-months.[77][78]

Outrages (2019)

Wolf's book *Outrages: Sex, Censorship, and the Criminalization of Love* was published in 2019, a work based on the 2015 doctoral thesis she had completed under the supervision of Trinity College, Oxford, literary scholar Stefano-Maria Evangelista.[21][20] In the book, she studies the repression of homosexuality in relation to attitudes towards divorce and prostitution, and also in relation to the censorship of books.[79]

The book was published in the UK in May 2019 by Virago Press.[80] On June 12, 2019, *Outrages* was named on the *O, The Oprah Magazine*'s "The 32 Best Books by Women of Summer 2019" list.[81] The following day, the US publisher recalled all copies from US bookstores.[82]

An error in a central tenet of the book — a misunderstanding of the legal term "death recorded", which Wolf had taken to mean that the convict had been executed but which in fact means that the convict was pardoned or the sentence was commuted — was identified in a 2019 BBC radio interview with broadcaster and author Matthew Sweet.[83][84][85] He cited a website for the Old Bailey Criminal Court, the same site which Wolf had referred to as one of her sources earlier in the interview.[86] Reviewers have described other errors of scholarship in the work.[87][88]

Wolf appeared at the Hay Festival, Wales in late May 2019, a few days after her exchange with Matthew Sweet, where she defended her book and said she had already corrected the error,[89] but, as of October 2019, she had yet to do so.[90] She stated at an event in Manhattan in June that she was not embarrassed by the correction, but rather felt grateful towards Sweet for the correction.[91][92] On October 18, 2019, it became known the release of the book by Houghton Mifflin Harcourt in the United States was being canceled. Wolf expressed the hope that the book would still be published in the US.[93][94]

A UK paperback edition of the book was published by Virago in November 2020, with the incorrect references to the execution of men for sodomy that were included in the hardback edition removed. Interviewed about the new edition, Matthew Sweet said that the book continues to misread historical sources: "Dr Wolf has misrepresented the experiences of victims of child abuse and violent sexual assault. This is the most profound offence against her discipline, as well as the memories of real people on the historical record". Cultural historian Fern Riddell called the book a "calumny against gay people" in the nineteenth century and said that Wolf "presents child rapists and those taking part in acts of bestiality as being gay men in consensual relationships and that is completely wrong". *The Daily Telegraph* reported that there had been calls for Wolf's 2015 DPhil to be re-examined, and for Virago to withdraw the book.[95] In a statement to *The Guardian*, Wolf said the book had been reviewed "by leading scholars in the field", and said "it is clear that I have accurately represented the position". The University of Oxford stated that a "statement of clarification" to Wolf's thesis had been received and approved, and would be "available for consultation in the Bodleian Library in due course".[96]

The book has been used as an example in university teaching about the danger of misreading historical sources.[97]

Feminist issues

Abortion

In an October 1995 article for *The New Republic* Wolf was critical of contemporary pro-choice positions, arguing that the movement had "developed a lexicon of dehumanization" and urged feminists to accept abortion as a form of homicide and defend the procedure within the ambiguity of this moral conundrum. She continued, "Abortion should be legal; it is sometimes even necessary. Sometimes the mother must be able to decide that the fetus, in its full humanity, must die."[98]

Wolf concluded by speculating that in a world of "real gender equality," passionate feminists "might well hold candlelight vigils at abortion clinics, standing shoulder to shoulder with the doctors who work there, commemorating and saying goodbye to the dead."[98] In an article for *New York* magazine on the subtle manipulation of George W. Bush's image among women, Wolf wrote in 2005: "Abortion is an issue not of *Ms.* Magazine-style fanaticism or suicidal Republican religious reaction, but a complex issue."[99]

Pornography

Wolf suggested in a 2003 article for *New York* magazine that the ubiquity of internet pornography tends to enervate the sexual attraction of men toward typical real women. She writes, "The onslaught of porn is responsible for deadening male libido in relation to real women, and leading men to see fewer and fewer women as 'porn-worthy.' Far from having to fend off porn-crazed young men, according to Wolf, young

women are worrying that as mere flesh and blood, they can scarcely get, let alone hold, their attention." Wolf advocated abstaining from porn not on moral grounds, but because "greater supply of the stimulant equals diminished capacity."[100]

Women in Islamic countries

Wolf has commented about the dress required of women living in Muslim countries. In *The Sydney Morning Herald* in August 2008, she wrote:

> The West interprets veiling as repression of women and suppression of their sexuality. But when I traveled in Muslim countries and was invited to join a discussion in women-only settings within Muslim homes, I learned that Muslim attitudes toward women's appearance and sexuality are not rooted in repression, but in a strong sense of public versus private, of what is due to God and what is due to one's husband. It is not that Islam suppresses sexuality, but that it embodies a strongly developed sense of its appropriate channeling – toward marriage, the bonds that sustain family life, and the attachment that secures a home.[101]

Other views and promotion of conspiracy theories

In the January 2013 issue of *The Atlantic*, law and business professor Mark Nuckols wrote: "In her various books, articles, and public speeches, Wolf has demonstrated recurring disregard for the historical record and consistently mutilated the truth with selective and ultimately deceptive use of her sources." He further stated: "[W]hen she distorts facts to advance her political agenda, she dishonors the victims of history and poisons present-day public discourse about issues of vital importance to a free society." Nuckols argued that Wolf "has for many years now been claiming that a fascist coup in America is imminent. ... [I]n *The Guardian* she alleged, with no substantiation, that the U.S. government and big American banks are conspiring to impose a 'totally integrated corporate-state repression of dissent'."[63]

Vox journalist Max Fisher urged Wolf's readers "to understand the distinction between her earlier work, which rose on its merits, and her newer conspiracy theories, which are unhinged, damaging, and dangerous."[10]

Charles C. W. Cooke, writing for *National Review Online*, commented:

> Over the last eight years, Naomi Wolf has written hysterically about coups and about vaginas and about little else besides. She has repeatedly insisted that the country is on the verge of martial law, and transmogrified every threat—both pronounced and overhyped—into a government-led plot to establish a dictatorship. She has made prediction after prediction that has simply not come to pass. Hers are not sober and sensible forecasts of runaway human nature, institutional atrophy, and constitutional decline, but psychedelic fever-dreams that are more typically suited to the *InfoWars* crowd.[102]

Under the headline "Naomi Wolf Went Off the Deep End Long Ago", Aaron Goldstein in *The American Spectator* advised, "Her words must be taken not just with a grain of salt, but a full shaker's worth."[103]

Defense of Julian Assange

Shortly after the WikiLeaks founder Julian Assange was arrested in 2010, she wrote in an article for *The Huffington Post* that the allegations made against him by his two reputed victims amounted to no more than bad manners from a boyfriend.[104] His accusers, she later wrote in several contexts, were working for the CIA and Assange had been falsely incriminated.[105]

On December 20, 2010, *Democracy Now!* featured a debate between Wolf and Jaclyn Friedman on the Assange case. According to Wolf, the alleged victims should have said no, asserted that they consented to having sex with him, and said the claims were politically motivated and demeaned the cause of legitimate rape victims.[106] In a 2011 *Guardian* article she objected to Assange's two accusers having their anonymity preserved.[107] In response, Katha Pollitt wrote in *The Nation* that the "point is a little bizarre: doesn't Wolf realize that anonymity applies only to the media? Everyone in the justice system knows who the complainants are."[108]

Occupy Wall Street

On October 18, 2011, Wolf was arrested and detained in New York during the Occupy Wall Street protests, having ignored a police warning not to remain on the street in front of a building. Wolf spent about 30 minutes in a cell.[109] She disputed the NYPD's interpretation of applicable laws: "I was taken into custody for disobeying an unlawful order. The issue is that I actually know New York City permit law ... I didn't choose to get myself arrested. I chose to obey the law and that didn't protect me."[110]

A month later, Wolf argued in *The Guardian*, citing leaked documents, that attacks on the Occupy movement were a coordinated plot, orchestrated by federal law enforcement agencies. Those leaks, she alleged, showed that the FBI was privately treating OWS as a terrorist threat, rather than the public assertions acknowledging it is a peaceful organization.[111] The response to this article ranged from praise to criticism of Wolf for being overly speculative and creating a "conspiracy theory".[112] Wolf responded that there is ample evidence for her argument, and proceeded to review the information available to her at the time of the article, and what she alleged was new evidence since that time.[113]

Imani Gandy of Balloon Juice, wrote that "nothing substantiates Wolf's claims", that "Wolf's article has no factual basis whatsoever and is, therefore, a journalistic failure of the highest order" and that "it was incumbent upon (Wolf) to fully research her claims and to provide facts to back them up."[114] Corey Robin, a political theorist, journalist, and associate professor of political science at Brooklyn College and the Graduate Center of the City University of New York, stated on his blog: "The reason Wolf gets her facts wrong is that she's got her theory wrong."[115]

In early 2012, WikiLeaks began publishing the Global Intelligence Files, a trove of e-mails obtained via a hack by Anonymous and Jeremy Hammond. Among them was an email with an official Department of Homeland Security document from October 2011 attached. It indicated that DHS was closely watching Occupy, and concluded, "While the peaceful nature of the protests has served so far to mitigate their impact, larger numbers and support from groups such as Anonymous substantially increase the risk for potential incidents and enhance the potential security risk to critical infrastructure." In late December 2012, FBI documents released following an FOIA request from the Partnership for Civil Justice Fund revealed that the FBI used counterterrorism agents and other resources to extensively monitor the national Occupy movement.[116] The documents contained no references to agency personnel covertly infiltrating Occupy branches, but did indicate that the FBI gathered information from police departments and other law enforcement agencies relating to planned protests.[117] Additionally, the blog Techdirt reported that the documents disclosed a plot by unnamed parties "to murder OWS leadership in Texas" but that "the FBI never bothered to inform the targets of the threats against their lives."[118]

In a December 2012 article for *The Guardian*, Wolf wrote:

> It was more sophisticated than we had imagined: new documents show that the violent crackdown on Occupy last fall [2011]—so mystifying at the time—was not just coordinated at the level of the FBI, the Department of Homeland Security, and local police. The crackdown, which involved, as you may recall, violent arrests, group disruption, canister missiles to the skulls of protesters, people held in handcuffs so tight they were injured, people held in bondage till they were forced to wet or soil themselves—was coordinated with the big banks themselves.
>
> How simple ... just to label an entity a 'terrorist organization' and choke off, disrupt or indict its sources of financing.
>
> [The FBI crackdown on Occupy] was never really about 'the terrorists'. It was not even about civil unrest. It was always about this moment, when vast crimes might be uncovered by citizens—it was always, that is to say, meant to be about you.[119]

Mother Jones claimed that none of the documents revealed efforts by federal law enforcement agencies to disband the Occupy camps, and that the documents did not provide much evidence that federal officials attempted to suppress protesters' free speech rights. It was, said *Mother Jones*, "a far cry from Wolf's contention."[120]

Edward Snowden

In June 2013, *New York* magazine reported Wolf, in a recent Facebook post, had expressed her "creeping concern" that NSA leaker Edward Snowden "is not who he purports to be, and that the motivations involved in the story may be more complex than they appear to be."[12] Wolf was similarly skeptical of Snowden's "very pretty pole-dancing Facebooking girlfriend who appeared for, well, no reason in the media coverage ... and who keeps leaking commentary, so her picture can be recycled in the press."[12] She pondered whether he was planted by "the Police State".[121]

Wolf responded on her website: "I do find a great deal of media/blog discussion about serious questions such as those I raised, questions that relate to querying some sources of news stories, and their potential relationship to intelligence agencies or to other agendas that may not coincide with the overt narrative, to be extraordinarily ill-informed and naive." Specifically regarding Snowden, she wrote, "Why should it be seen as bizarre to wonder, if there are some potential red flags—the key term is 'wonder'—if a former NSA spy turned apparent whistleblower might possibly still be—working for the same people he was working for before?"[122]

She was accused by the *Salon* website of making factual errors and misreadings.[121]

Islamic State executions and other assertions

In a series of Facebook postings in October 2014, Wolf questioned the authenticity of videos purporting to show beheadings of two American journalists and two Britons by the Islamic State, implying that they had been staged by the US government and that the victims and their parents were actors.[10][64] Wolf also charged that the US was dispatching military troops not to assist in treating the Ebola virus epidemic in West Africa, but to carry the disease back home to justify a military takeover of

America.[10][13] She further said that the 2014 Scottish independence referendum, in which Scotland voted to remain in the United Kingdom, was faked.[10] Speaking about this at a demonstration in Glasgow on October 12, Wolf said, "I truly believe it was rigged."[123]

Responding to such criticism, Wolf said, "All the people who are attacking me right now for 'conspiracy theories' have no idea what they are talking about ... people who assume the dominant narrative MUST BE TRUE and the dominant reasons MUST BE REAL are not experienced in how that world works." To her nearly 100,000 Facebook followers, Wolf maintained, "I stand by what I wrote."[13] However, in a later Facebook post, Wolf retracted her statement: "I am not asserting that the ISIS videos have been staged", she wrote.

> I certainly sincerely apologize if one of my posts was insensitively worded. I have taken that one down. ... I am not saying the ISIS beheading videos are not authentic. I am not saying they are not records of terrible atrocities. I am saying that they are not yet independently confirmed by two sources as authentic, which any Journalism School teaches, and the single source for several of them, SITE, which received half a million dollars in government funding in 2004, and which is the only source cited for several, has conflicts of interest that should be disclosed to readers of news outlets.[124]

Max Fisher commented that "the videos were widely distributed on open-source jihadist online outlets" while the "Maryland-based nonprofit SITE monitors extremist social media." Wolf deleted her original Facebook posts.[10]

COVID-19 pandemic

Following the election of Joe Biden as US president, Wolf tweeted on 9 November 2020: "If I'd known Biden was open to 'lockdowns' as he now states, which is something historically unprecedented in any pandemic, and a terrifying practice, one that won't ever end because elites love it, I would never have voted for him".[125] In February 2021, Wolf appeared on *Tucker Carlson Tonight* on Fox News, where she said that government COVID restrictions were turning the U.S. "into a totalitarian state before everyone's eyes," and went on to say that "I really hope we wake up quickly, because history also shows that it's a small window in which people can fight back before it is too dangerous to fight back."[126]

Personal life

Wolf's first marriage was to journalist David Shipley, then an editor at *The New York Times*. The couple had two children, a son and daughter.[17] Wolf and Shipley divorced in 2005.[19]

On November 23, 2018, Wolf married Brian William O'Shea, a disabled US Army veteran, private detective, and owner of Striker Pierce Investigations. According to a *New York Times* article published in November 2018, Wolf and O'Shea met in 2014 due to threats against Wolf after reporting on human rights violations in the Middle East.[1] The couple live in New York City.

Alleged "sexual encroachment" incident at Yale

In 2004, in an article for *New York* magazine, Wolf accused literary scholar Harold Bloom of a "sexual encroachment" in late Fall 1983 for touching her inner thigh. She said that what she alleged Bloom did was not harassment, either legally or emotionally, and she did not think herself a "victim", but that she had harbored this secret for 21 years. Explaining why she had finally gone public with the charges, Wolf wrote,

> I began, nearly a year ago, to try—privately—to start a conversation with my alma mater that would reassure me that steps had been taken in the ensuing years to ensure that unwanted sexual advances of this sort weren't still occurring. I expected Yale to be responsive. After nine months and many calls and e-mails, I was shocked to conclude that the atmosphere of collusion that had helped to keep me quiet twenty years ago was still intact—as secretive as a Masonic lodge.[127] Sexual encroachment in an educational context or a workplace is, most seriously, a corruption of meritocracy; it is in this sense parallel to bribery. I was not traumatized personally, but my educational experience was corrupted. If we rephrase sexual transgression in school and work as a civil-rights and civil-society issue, everything becomes less emotional, less personal. If we see this as a systemic corruption issue, then when people bring allegations, the focus will be on whether the institution has been damaged in its larger mission.[127]

In *Slate* magazine around the time the allegations against Bloom first surfaced, Meghan O'Rourke wrote that Wolf generalized about sexual assault at Yale on the basis of her alleged personal experience. Moreover, O'Rourke commented, that despite Wolf's assertion sexual assault existed at Yale, she did not interview any Yale students for her story. In addition, O'Rourke wrote, "She jumps through verbal hoops to make it clear she was not 'personally traumatized,' yet she spends paragraphs describing the incident in precisely those terms." O'Rourke wrote that, despite Wolf's claim that her educational experience was corrupted, "(s)he neglects to mention that she later was awarded a Rhodes (scholarship)." O'Rourke concluded Wolf's "gaps and imprecision" in the *New York* article "give fodder to skeptics who think sexual harassment charges are often just a form of hysteria."[128]

Separately, a formal complaint was filed with the US Department of Education Office for Civil Rights on March 15, 2011, by 16 current and former Yale students—12 female and 4 male—describing a sexually hostile environment at Yale. A federal investigation of Yale University began in March 2011 in response to the complaints.[129] Wolf stated on CBS's *The Early Show* in April: "Yale has been systematically covering up much more serious crimes than the ones that can be easily identified." More specifically, she alleged "they use the sexual harassment grievance procedure in a very cynical way, purporting to be supporting victims, but actually using a process to stonewall victims, to isolate them, and to protect the university."[130] Yale settled the federal complaint in June 2012, acknowledging "inadequacies" but not facing "disciplinary action with the understanding that it keeps in place policy changes instituted after the complaint was filed. The school (was) required to report on its progress to the Office of Civil Rights until May, 2014."[131]

In January 2018, Wolf accused Yale officials of blocking her from filing a formal grievance against Bloom. She told *The New York Times* that she had attempted to file the complaint in 2015 with Yale's University-Wide Committee on Sexual Misconduct, but that the university had refused to accept it.[132] On January 16, 2018, Wolf said, she determined to see Yale's provost, Ben Polak, in another attempt to present her case. "As she documented on Twitter," the newspaper reported, "she brought a suitcase and a sleeping bag, because she said she did not know how long she would have to stay. When she arrived at the provost's office, she said, security guards prevented her from entering any elevators. Eventually, she said, Aley Menon, the secretary of the sexual misconduct committee, appeared and they met in the committee's offices for an hour, during which she gave Ms. Menon a copy of her complaint."[132] This

was reported and confirmed by Norman Vanamee who apparently met Wolf at Yale on this morning. In *Town & Country* magazine in January 2018, Vanamee returned to the story and wrote, "Yale University has a 93-person police department, and, after the guard called for backup, three of its armed and uniformed officers appeared and stationed themselves between Wolf and the elevator bank."[133]

During an interview for *Time* magazine in spring 2015, Bloom denied ever being indoors with "this person" whom he referred to as "Dracula's daughter."[134]

Selected works

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- Appearances (https://www.c-span.org/person/?naomiwolf) on C-SPAN
- Naomi Wolf (https://charlierose.com/videos/4079) on *Charlie Rose*
- Naomi Wolf (https://www.imdb.com/name/nm0937890/) at IMDb
- Works by or about Naomi Wolf (https://worldcat.org/identities/lccn-n90-695495) in libraries (WorldCat catalog)
- @naomirwolf on Twitter (https://twitter.com/naomirwolf)
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DACA Timeline

Deferred Action for Childhood Arrivals

DACA Timeline – June 2012

- Department of Homeland Security issues a policy memorandum
- Memorandum announces a policy of “exercising prosecutorial discretion with respect to individuals who came to the United States as children
- Young people impacted by DACA are often referred to as “Dreamers”
- Janet Napolitano, *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children*, U.S. DEP'T OF HOMELAND SEC. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

DACA Timeline – November 2014

- Secretary of Homeland Security Jeh Johnson announces expansion of "deferred action" impacting 4 million parents of U.S. citizens or permanent residents
- This is referred to as DAPA
- Jeh Charles Johnson, *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, U. S. DEPAR'T OF HOMELAND SECURITY, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

DACA Timeline – February 2015

- U.S. v. Texas
- U.S. District Judge Andrew Hanen in Brownsville, Texas, issued a nationwide injunction to prevent the DAPA policy from taking effect.
- Affirmed by 5th cir. (5-4), and SCOTUS (4-4)
- *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).
- *United States v. Texas*, 138 S. Ct. 2271 (2016).

DACA Timeline – September 2017

- Secretary of Homeland Security Elaine Duke issued a memo announcing the “rescission of Deferred Action for Childhood Arrivals
- Memorandum from Elaine C. Duke, Acting Sec'y of the Dep't of Homeland Sec., to James W. McCament, Acting Dir. U.S. Citizenship & Immigration Servs., et al., *Re Rescission of the June 12, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*" (Sept. 5, 2017)

DACA Timeline – January 2018

- Dep ’t of Homeland Security v. Regents of the University of California
- U.S. District Judge William Alsup in San Francisco issued a nationwide order blocking the Trump administration’s repeal of DACA
- Judges in New York and Washington, D.C., later handed down similar orders, and the 9th Circuit Court in San Francisco affirmed Alsup’s order in November
- Due to the January 9, 2018 federal court order for preliminary injunction, USCIS announced on January 13, 2018 that the agency, “has resumed accepting requests to renew a grant of deferred action under DACA
- Regents of the U. Cal. v. Dep't Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal 2018)

DACA Timeline – June 2019

- The Supreme Court announced it will hear the Trump administration's appeal in three consolidated cases, led by the California case known as Department of Homeland Security vs. Regents of the University of California

DACA Timeline – June 2020

- Dep’t of Homeland Security v. Regents of the University of California
- Supreme Court ruled (5-4) that DHS’s rescission of DACA violated the Administrative Procedure Act (APA) because the agency did not provide a reasoned explanation for its action
- This decision “restores DACA to its pre-September 5, 2017 status”
- Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020)

DACA Timeline – July 17, 2020

- Casa de Maryland v. U.S. Dep’t of Homeland Security
- Judge Paul W. Grimm in the U.S. District Court in Maryland ordered that the Trump administration begin accepting new applicants (prior to this decision USCIS was renewing DACA status but not accepting new applications)

DACA Timeline – July 28, 2020

- Acting Secretary of Homeland Security Chad F. Wolf announced that in response to the Supreme Court's decision, the Department of Homeland Security will take action to thoughtfully consider the future of the DACA policy, including whether to fully rescind the program.
- Chad F. Wolf , *Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"*, U.S. DEP'T OF HOMELAND SEC. (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf

DACA Timeline – November 14, 2020

- Batalla Vidal v. Wolf
- Judge Garaufis in the E.D.N.Y. held Wolf was not lawfully serving as the Acting Secretary of Homeland Security when the Wolf Memorandum was issued, because the Department of Homeland Security failed to follow its order of succession, as lawfully designated under the Homeland Security Act.
- Vidal v. Wolf, 2020 U.S. Dist. LEXIS 213068 (E.D.N.Y. Nov. 14, 2020)

DACA Timeline – December 4, 2020

- Batalla Vidal v. Wolf
- Judge Garaufis in the E.D.N.Y. held that because Wolf was not lawfully serving as the Acting Secretary of Homeland Security when the Wolf Memorandum was issued (per November 14 decision), the Wolf Memorandum is vacated, and DACA is currently governed by its terms "as they existed prior to the attempted rescission of September 2017."
- Vidal v. Wolf, 2020 U.S. Dist. LEXIS 228328 (E.D.N.Y. Dec. 4, 2020)

DACA Timeline – January 20, 2021

- President Biden issues memorandum “Preserving and Fortifying Deferred Action for Children Arrivals”
- The memorandum states the Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA
- 3 CFR Memorandum of January 20, 2021