The Supreme Court's DACA Opinion and the Impact on Agriculture

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Overview

Last month, the U.S. Supreme Court issued its opinion in *Department of Homeland Security, et al. v. Regents of the University of California, et al., 140 S. Ct. 1891 (2020)* where the Court denied the U.S. Department of Homeland Security's (DHS) revocation of the Deferred Action for Childhood Arrivals (DACA). The Court's decision is of prime importance to agriculture because the case involved the ability of a federal government agency to create rules that are applied with the force of law without following the notice and comment requirements of the Administrative Procedure Act. Agricultural activities are often subjected to the rules developed by federal government agencies, making it critical that agency rules are subjected to public input before being finalized.

The Supreme Court's DACA opinion and agriculture – it's the topic of today's post.

Background

The DHS started the DACA program by issuing an internal agency memorandum in 2012. The DHS took this action after numerous bills in the Congress addressing the issue failed to pass over a number of years. The DACA program allowed illegal aliens that were minors at the time they illegally entered the United States to apply for a renewable, two-year reprieve from deportation. The DACA program also gave these illegal immigrants work authorizations and access to taxpayer-funded benefits such as Social Security and Medicare. Current estimates are that between one million and two million DACA-protected illegal immigrants are eligible for benefits In 2014, the DHS attempted to expand DACA to provide amnesty and taxpayer benefits for over four million illegal aliens, but the expansion was foreclosed by a federal courts in 2015 for providing benefits to illegal aliens without following the procedural requirements of the Administrative Procedure Act as a substantive rule and for violating the Immigration and Naturalization Act. *Texas v. United States, 809 F.3d 134 (5th Cir. 2015), aff'g., 86 F. Supp. 3d 591 (S.D. Tex. 2015).* In 2016, the U.S. Supreme Court affirmed the lower court decisions. *United States v. Texas, 136 S. Ct. 2271 (2016).* Based on these court holdings and because DACA was structured similarly, the U.S. Attorney General issued an opinion that the DACA was also legally defective. Accordingly, in June of 2017, the DHS announced via an internal agency memorandum that it would end the illegal program by no longer accepting new applications or approving renewals other than for those whose benefits would expire in the next six months. Activist groups sued and the Supreme Court ultimately determined that the action of the DHS was improper for failing to provide sufficient policy reasons for ending DACA. In other words, what was created with the stroke of a pen couldn't be eliminated with a stroke of a pen.

Administrative Procedure Act (APA)

The APA was enacted in 1946. *Pub. L. No. 79-404, 60 Stat. 237 (Jun. 11, 1946).* The APA sets forth the rules governing how federal administrative agencies are to go about developing regulations. It also gives the federal courts oversight authority over all agency actions. The APA has been referred to as the "Constitution" for administrative law in the United States. A key aspect of the APA is that any substantive agency rule that will be

applied against an individual or business with the force of law (e.g., affecting rights of the regulated) must be submitted for public notice and comment. *5 U.S.C. §553*. The lack of DACA being subjected to public notice and comment when it was created and the Court's requirement that it couldn't be removed in like fashion struck a chord with the most senior member of the Court. Justice Thomas authored a biting dissent that directly addressed this issue. He wrote, "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." Justice Alito joined Justice Thomas in dissent stating, "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)*.... Second, to the extent we could review the rescission, it was not arbitrary and capricious." Justice Thomas went on to term the majority's decision "mystifying."

Application to Agriculture

Farmers and ranchers often deal with the rules developed by federal (and state) administrative agencies. Those agency rules often involve substantive rights and, as such, are subject to the notice and comment requirements of the APA. Failure to follow the APA often results in the restriction (or outright elimination) of property rights without the necessary procedural protections the APA affords. It's also important that when administrative agencies overstep their bounds, a change in agency leadership has the ability to swiftly rescind prior illegal actions – a point Justice Thomas made clear in his dissent. The importance of holding government agencies accountable to the requirements of the APA is illustrated below.

USDA. The USDA has a history of being notoriously poor at complying with the APA. Both the Farm Service Agency (FSA) and the Natural Resource Conservation Service (NRCS) issue manuals and numerous amendments containing provisions that are applied against farmers with the force of law without subjecting the provisions to the APA. The National Food Security Act Manual (NFSAM), the key publication detailing the requirements for participating in federal farm programs, is presently in its fifth edition. Many amendments have been made to the various editions, none of which have been subjected to the APA.

The history of Swampbuster is also illustrative. The legislation creating Swampbuster was contained in the 1985 Farm Bill. It made no mention of farmed wetlands. An interim agency rule in March 1986 also did not mention the concept. However, a final rule issued in September 1987 added farmed wetland, commenced conversions and minimal effect with no opportunity for farmers, ranchers and other landowners to comment. In the mid-1990s an interim final rule was issued under the APA and comments were solicited. The rule is still in effect. It was never made a final rule and it is still in interim status 20+ years later. It has even been amended a few times. In 1996 the Congress amended the law requiring that changes to all wetland conservation and highly erodible land provisions be adopted pursuant to public review and comment. In all practicality, however, the USDA merely solicits comments and makes no revisions after comments have been made.

As for drain maintenance, the U.S. Court of Appeals for the Eighth Circuit in *Barthel v. United States Department of Agriculture, 181 F.3d 834 (8th Cir. 1999),* held that a drainage device can be manipulated after December. 23, 1985, to the extent necessary to allow the best historic drainage of the affected land. In other words, the landowner is entitled to the "wetland and farming regime" on the land irrespective of what manipulation occurs

to the specific drainage device. However, the NRCS did not respond to *Barthel* decision until 2015 with the issuance of state offsite methods that looked at historic photographs and supported mathematical modeling.

The Iowa Experience. Wetland issues often interact with common farming and ranching activities. Wetland rules come from two sources - the Clean Water Act (CWA) and the United States Department of Agriculture (USDA). The wetland rules of the CWA have been developed by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE). More specifically, the CWA rules are administered by the COE for the EPA. The EPA can veto COE decisions, but rarely does. That the EPA and COE comply with the APA is critical.

For Iowa farmers, the need for government agencies to comply with the APA has been recently illustrated in several important ways.

- When evaluating wetland mitigation, the COE is required to consider wetland functions and societal values. For example, a nutrient removal wetland would normally be valued higher over its flooding of a channelized low value headwater stream that is only wet due to drainage from tile lines. But the COE does not administer the law in that manner. Instead, the COE determines what mitigation is needed to offset lost stream functions. Then it decides if that mitigation satisfies societal values in its permit decision. This COE policy has been developed outside of the APA and adds cost to nutrient removal wetlands, eliminates some, and protects lower-valued common headwater streams. The public is provided no input into the process (as it would via the APA process) as to whether the flooding of headwater streams without mitigation of lost stream channel functions would be an acceptable loss in favor of the creation of highly-valued nutrient removal wetlands.

- The COE and the Iowa Department of Natural Resources (IDNR) worked together to create an Iowa Stream Mitigation Method without observing either the state or federal APA. The COE simply used, without any formal rulemaking, the Missouri stream mitigation method (a rather strict method) in Iowa for determining mitigation needs and permits. The Iowa Department of Transportation asked the IDNR for an in-lieu fee mitigation option for stream mitigation in road projects. Ultimately, the COE adopted the IDNR's stream mitigation method without following the Iowa APA, published it as its own, solicited comments and adopted the rule.

- In 2017 the NRCS pursued a consistent state off-site method (SOSM) for the prairie pothole states of ND, SD, MN and IA. On June 22, 2017 the SOSM was published in the federal register and comments solicited. Iowa and MN received no comments. The SOSM endorsed the use of a water balance software called SPAW. It had been In the NRCS wetland hydrology tools manual since 1997. In late 2017, the Midwest Regional Conservationist directed all 4 pothole states to install the 2017 SOSM in their field office technical guides and to begin using them. However, in December 2018 the Iowa NRCS changed the SOSM to discourage the use of SPAW and to return to aerial photographs. This change was not subjected to public review or comment.

- Presently, the NRCS is planning to triple the setback for new tile from a farmed wetland in soils that are classified as possible discharge soils. These soils are common. A procedure used to identify such soils was

expected to be announced and subjected to public comment and review. Instead, Iowa moved ahead in tripling the setback without public rulemaking.

The IRS. With respect to payments received under Conservation Reserve Program (CRP), the historic position of the IRS had been that, for a retired taxpayer who is not materially participating in the farm operations, payments received under the CRP would not be considered net income from self-employment. *Priv. Ltr. Rul. 8822064 (Mar. 7, 1988).* Likewise, the IRS position has been that where the farm operator or owner is materially participating in the farm operation, CRP payments constitute receipts from farm operations includible in net earnings from self- employment. *Letter from Peter K. Scott, Associate Chief Counsel, Technical, March 10, 1987.* Thus, the IRS took the position that someone must be materially participating to cause receipt of CRP rental to constitute net earnings from self-employment. The IRS had taken the same position with respect to payments received under the precursor program to the CRP – the Soil Bank.

The IRS informally (without going through the notice and comment procedures of the APA) changed its historic position concerning the self-employment tax treatment of CRP payments in a Chief Counsel's Letter Ruling dated May 29, 2003. *C.C.A. 200325002 (May 29, 2003).* In the ruling, IRS took the position directly contrary to Priv. Ltr. Rul. 8822064 and held that a landowner's activities under a CRP contract amount to material participation and the payments should be reported on Schedule F, not Schedule E or Form 4835. That is the Chief Counsel's position for retired landowners as well as those conducting a farming business and those who are not conducting a farming business. In late 2006, IRS issued a Notice of proposed revenue ruling essentially following the 2003 CCA letter ruling. Notice 2006-108, I.R.B. 2006-51. After the comment period ended (during which IRS received zero public comments supporting its proposed change of position) the IRS announced that it was canceling its plans to issue a Revenue Ruling on the issue, but that it was not changing its position on the matter. However, the IRS never issued the Revenue Ruling that would have obsoleted the key Revenue Rulings from 1960s concerning the self-employment tax treatment of Soil Bank payments. *Rev. Rul. 60-32; Rev. Rul 65-149.* Ultimately, the U.S. Circuit Court of Appeals ruled against the new IRS position, noting that the IRS had said it was going to promulgate a new rule announcing its changed position on the issue, but that it failed to do so. The court voiced its displeasure with the IRS antics in adopting a changed position that it was asserting against taxpayers by agency fiat. *Morehouse v. Comr., 769 F.3d 616 (8th Cir. 2014).*

More recently, in *Feigh v. Comr., 152 T.C. No. 15 (2019), the* petitioner received a Form W-2 reporting a difficulty of care payment under I.R.C. §131(c). However, such payments are excluded from income as a type of qualified foster care payment if made under a state's foster care program. In *Tech. Adv. Memo. 2010-007*, the IRS took the position that the payment of a difficulty care payment to the parent of a disabled child to the parent was not excludible because the "ordinary meaning" of foster care excluded care by a biological payment. But, in Notice 2014-7, and informal IRS pronouncement that is not "substantial authority" for tax purposes and was not subjected to formal rulemaking procedures under the APA, the IRS treated the payment as nontaxable to the recipient. The petitioner did not include the payment in income but did include the amount as earned income in computing the earned income credit under I.R.C. §32 and in computing the refundable child tax credit under I.R.C. §24. The IRS position was that since the amount was not taxable under Notice 2014-7, the amount did not count as earned income for computing the credits. I.R.C. §32(c)(2)(A)(i) states that earned income includes wages, salaries, tips and other employee compensation that has been included in gross income for the tax year.

The petitioner claimed that nothing in the actual statute, I.R.C. §131, allowed the IRS to treat the payment as not includible in gross income. The court agreed, noting that the IRS position was only a Notice and not a

formalized Revenue Ruling with the result that the petitioner could exclude the difficulty of care payment and obtain credits on that (untaxed) earned income. The IRS was not allowed to change the impact of the tax law without going through the proper administrative procedure. The IRS later acquiesced in result only to the Tax Court's decision. *A.O.D. 2020-20, 2020-14 IRB 558.*

Conclusion

The Supreme Court's DACA decision is a huge blow to the rule of law as applied in the context of administrative agencies, and the requirement that agency rules applied with the force of law to farmers and ranchers (and other landowners) must be subjected to the public notice and comment requirement of the APA.