ESSAY

THE ROBERTS COURT'S REVIEW OF ADMINISTRATIVE ACTION: PROMOTING POLITICAL ACCOUNTABILITY OR INTENSIFYING PROCESS REVIEW?

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In "*Reasoned Explanation and Political Accountability in the Roberts Court*,"[1] Professor Benjamin Eidelson identifies a pronounced shift in judicial review of administrative action. Focusing on the Court's recent decisions in *Department of Homeland Security v. Regents of the University of California*[2] and *Department of Commerce v. New York*,[3] Eidelson argues that the Court for the first time is using "arbitrary and capricious" review under the Administrative Procedure Act (APA)[4] to facilitate the public's understanding of the reasons animating agency action.[5] Judicial review under the APA therefore would include not only concern that the agency consider relevant factors and address salient evidence but also that the public understand *why* the agency adopted its position. These two decisions, therefore, extend beyond simply judicial minimalism,[6] and represent in his view a profound shift in administrative law.

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1. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1748, 1752–60 (2021) (identifying political accountability as playing a role in recent Supreme Court decisions reviewing administrative actions) [hereinafter Eidelson, *Reasoned Explanation*].

2. 140 S. Ct. 1891 (2020).

3. 139 S. Ct. 2551 (2019).

4. Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

5. Eidelson, *Reasoned Explanation*, *supra* note 1, at 1748, 1752–54.

6. These two decisions reflect Justice Roberts's art of judicial minimalism, resting the Court's most controversial decisions on the narrowest ground possible. *See* Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE, Aug. 27, 2020, at 28, 28–35 (discussing Chief Justice Roberts's use of conservative minimalism);

With respect to the Deferred Action for Childhood Arrivals case (DACA case), Eidelson illustrates the evolving approach first by noting the Court's insistence upon focusing only on the contemporaneous justification provided by the Department of Homeland Security (DHS).[7] At the time of the rescission, Acting Secretary of DHS Elaine Duke justified the rescission based on Attorney General Sessions's earlier determination that DACA was illegal, while Secretary Kirstjen Nielsen later amplified that the agency based its rescission not only on doubts of DACA's legality, but also on 1) her conviction that Congress should address the complicated immigration issues and 2) that DACA as constituted by President Obama encouraged illegal discrimination.[8] Although Eidelson recognizes that courts pursuant to the *Chenery* doctrine[9] long have considered only an agency's contemporaneous justification as opposed to later clarifications or emendations, he argues that considering the contemporaneous justification serves the goal of facilitating political accountability. The public is not as likely to learn of later modifications or substitute justifications, which he effectively accents by showing the lack of publicity that Secretary Nielsen's post hoc justifications received.[10] The public's reaction to a rescission of DACA for legal reasons may well be different from reaction to a rescission stemming from an effort to curb future immigration.

Second, Eidelson argues that the Court also rejected Acting Secretary Duke's contemporaneous justification to promote political accountability. He explains that the Administration hid behind its claim that DACA was illegal to avoid tackling the full slate of policy issues implicated, which he terms a "buck-passing" strategy.[11] In other words, the agency refused to acknowledge that, even if DACA had been illegal, the agency could have

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Gillian E. Metzger, *The Roberts Court and Administrative Law*, SUP. CT. REV. 1, 63–67 (2019) (summarizing Chief Justice Roberts's minimalist application of formalist principles); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 253 (2020); Jennifer M. Chacon, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 268 (2019); John O. McGinnis, *What Does the Chief Justice Maximize?*, LAW & LIBERTY (July 9, 2020), https://lawliberty.org/what-does-the-chief-justice-maximize/; Ilya Slomin, *Thoughts on the Supreme Court's Sound, but Very Narrow Ruling on DACA*, VOLOKH CONSPIRACY (June 18, 2020), https://reason.com/volokh/2020/06/18/thoughts-on-the-courts-sound-but-very-narrow-ruling-on-daca/; Ilya Shapiro, *The Roberts Court*, CATO SUPREME CT. REV. 2019–20, at xiv–xv.

7. *Reasoned Explanation*, *supra* note 1, at 1766–67.

8. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020).

9. SEC v. Chenery, 318 U.S. 80, 94 (1943) (holding in part that judges should review agency action based solely on the agency justifications that appear in the record).

10. Eidelson, *supra* note 1, at 1766. *But see infra* note 53 (suggesting that the public may not always focus on the contemporaneous justification).

11. *See, e.g.*, Eidelson, *supra* note 1, at 1759–60.

taken steps to protect the Dreamers in light of their reliance interests. The Court's refusal to allow the agency to narrow its options sub silentio promoted values of political accountability.[12] These two aspects of the DACA case worked in tandem to ensure that the Administration would pay the political price if it chose once again to rescind DACA.[13]

Eidelson similarly views the Court's rejection in *Department of Commerce* of the agency's explanation for including the citizenship question in the census as pretextual because the Court's holding ensures that the public consider the "real" reasons underlying the agency decision—not the fabricated justification about enforcing the Voting Rights Act.[14] The Court's mandate that only contemporaneous justifications be considered, that buck-passing explanations be rejected, and that contrived explanations be disregarded all promote political accountability.[15]

Eidelson highlights the importance of reason giving this way. Assume, he writes, that an elderly relative asks him to visit her in a nursing home.[16] It is one thing if he declines for fear of transmitting a contagious disease and quite another if he declines in order to stay at home watching television. Articulation of the reasons for declining to visit permits one to "know whether [his] choice warrants praise or blame, or how it should affect your expectations of [him] in the future."[17] The Court's review in the DACA case and in *Department of Commerce* permits the public to assess not just the agency's actions, but its reasons for taking particular courses of action.

Eidelson's analysis of the two Supreme Court decisions is cogent, and his conclusion that the Court's decisions should be understood as more than just an ad hoc piece of Chief Justice Roberts's judicial minimalism is persuasive. However, Eidelson's central theme that the cases unveil a new approach under the APA to bolster political accountability, though plausible, suffers from several drawbacks. Start with the DACA decision itself. There, in rebuffing the discrimination challenge to the DACA rescission, the Court relied on the very course of agency decisionmaking that he asserts lacked political accountability. The internal steps followed by DHS, as Eidelson notes,[18] were anything but public, but nonetheless the Court relied on that process in rejecting the discrimination claim. The Court stated that one route to finding animus lay in determining

12. *Id.* at 1774–75.
13. *Id.* at 1753.
14. *Id.* at 1785.
15. *Id.* at 1760.
16. *Id.* at 1758–59.
17. *Id.* at 1759.
18. *Id.* at 1761–63.

whether there were "[d]epartures from the normal procedural sequence,"[19] yet concluded that "there is nothing irregular about the history leading up to the September 2017 rescission."[20] If the agency follows the normal procedural steps—even when not visible to the public—less scrutiny is afforded as to what its true reasons were.

A comparison to *Trump v. Hawaii*[21] is instructive. For its third effort to fashion a travel ban, the Trump Administration invited input from around the world.[22] That version on its face appeared somewhat more neutral than its predecessors, and thus the Court had to ascertain whether other evidence of impermissible anti-Muslim sentiment—such as President Trump's campaign statements—amounted to unconstitutional bias.[23] The Court, per Chief Justice Roberts, repeatedly touted reflection and deliberation to justify upholding the travel ban. For instance, the Court stressed that the "President lawfully exercised his discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to national interest."[24] The Court continued that "[t]he President ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline."[25] Although the Chief Justice did not ignore the presence of the President's earlier biased statements, he concluded that the Proclamation's facial neutrality, coupled with its underlying vetting process, safeguarded its constitutionality.[26]

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19. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020).

20. *Id.* at 1916.

21. 138 S. Ct. 2392 (2018).

22. In blocking the first two travel bans, lower courts highlighted the botched process followed by the Trump Administration and concluded that such departures from a traditional policymaking path likely masked invidious intent. For instance, the U.S. District Court for the Eastern District of Virginia noted the absence of "expert agencies with broad experience on the matters" and the lack of "evidence that . . . a deliberative process took place." Aziz. v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017). In addition to those procedural abnormalities, the court noted the "highly particular sequence of events," including efforts by President Trump and his surrogates to find "legal" bases to ban Muslims from entering the country, as reasons to block the Executive Order's implementation. *Id.* at 737; *see also* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591–93, 596 (4th Cir. 2017) (considering it highly relevant that national security agencies were excluded from the decisionmaking process).

23. 138 S. Ct. at 2403–04, 2420–21.

24. *Id.* at 2408.

25. *Id.*

26. *See* Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. FORUM 825, 831–34 (2018) (addressing the Trump Administration's attempts to ban transgender individuals from the military).

Eidelson notes the difficulty in squaring the approach in *Trump v. Hawaii* with political accountability but argues that the President was uniquely accountable to the public for the travel ban, easing accountability concerns.[27] Perhaps so, but the same cannot be said for the behind-the-scenes discussions leading to the DACA rescission. Indeed, as Justice Sotomayor noted in dissent—"The [Administration]'s abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision."[28] That the Court failed to probe the Administration's rationale for the change more deeply is in tension with the public accountability thesis.[29] The Court demanded the "real" reasons for the rescission, but evidently was not as interested in determining whether those reasons stemmed from discriminatory animus. Thus, in refusing to delve more deeply into *why* the Administration rescinded DACA, the DACA decision suggests that Eidelson overread the APA parts of the decision that applied *Chenery* and then rejected Secretary Duke's contemporaneous justification for the rescission as insufficient.

Second, Eidelson's focus on political accountability slights other Roberts Court decisions in which the Court has stressed the importance of internal agency process apart from any concern for the agency's political accountability to the public. Taken as whole, the Court seems more interested in incentivizing process than in uncovering the "real" reasons underlying agency action. As an initial matter, consider the Court's decision in *FCC v. Fox Television Stations*,[30] which the Court relied upon in its DACA opinion.[31] There, the Roberts Court considered whether to uphold the Federal Communications Commission's (FCC's) decision to alter its indecency policy to prohibit even "fleeting" uses of profanity and nudity in daytime television.[32] In upholding the change in policy, the Court explained that the APA requires an agency to provide more substantial justification "when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account . . . . It would be

27. Eidelson, *Reasoned Explanation*, *supra* note 1, at 1793.

28. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1918 (2020).

29. *See* Eidelson, *supra* note 1, at 1822–24 (noting the problem presented but arguing that the Court's failure, though unfortunate, does not undermine his premise).

30. 556 U.S. 502 (2009).

31. *Dep't of Homeland Sec.*, 140 S. Ct. at 1913. The Court relied as well on the reasoning in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 41 (1983) (holding that an agency must forward a sufficient explanation for its decision to rescind a policy).

32. *Fox Television Stations, Inc.*, 556 U.S. at 505, 508–10.

arbitrary or capricious to ignore such matters."[33] Agencies should be able to change their minds, but only if in so doing they are consciously making new policy for the future and considering the costs of such change, including reliance interests as later discussed in the DACA case. Decisions, as in *Fox Television* and *Department of Homeland Security*, incentivize agencies to deliberate more widely before changing policy, with the goal of protecting the regulated public.[34]

The overlapping rationales in the DACA case, *Fox Television*, and *Chenery* likely stem more from a common law power to sharpen agency policymaking as opposed to any desideratum of political accountability.[35] The Court long has held that, as long as it does not require particular procedures,[36] it can incentivize agencies to proceed more cautiously—in the DACA case and *Chenery* through a requirement of contemporaneous justification,[37] and in the DACA case as well as in *Fox Television* through a requirement of adequate

33. *See id.* at 515 (citation omitted); *see also id.* at 535 (Kennedy, J., concurring). The Court in *Fox Television* deemed the agency's explanation for its change in position sufficient.

34. In exercising review on the merits in the Deferred Action for Childhood Arrivals case (DACA case), the Roberts Court thus provided similar incentives for more careful agency reasoning as it did in first limiting its review to the contemporaneous justification. Agencies need to justify changing policy before the change is announced and, in so doing, explain reasons for the change. The Roberts Court focused on comparable incentives in Encino Motorcars L.L.C. v. Navarro, 136 S. Ct. 2117, 2126 (2016) (refusing to defer to agency interpretation because the agency insufficiently justified its change in position).

35. Whether its review promoted political accountability or rather focused more narrowly on incentivizing careful agency action, the Court was engaged in a variant of administrative common lawmaking.

36. Although the Supreme Court directive was clear, the Court has itself grafted procedures onto the Administrative Procedure Act (APA) in order to facilitate judicial review. For instance, the Court has required the final rule in notice-and-comment rulemaking to be a logical outgrowth of the proposed rule—a requirement not specifically in the APA itself. *See, e.g.*, Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 174 (2007). The requirement is logical but not spelled out in the APA. And, at times, courts have required agencies to write a far more robust concise statement of basis and purpose for the final rule than anticipated by the APA's drafters. *See, e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) (overturning rule in part because of insufficiency of concise statement). Still, the Supreme Court overall has stressed that courts are not to impose additional procedures upon agencies when conducting notice-and-comment rulemaking, even when those procedures would aid the judicial role. For an assessment of the Supreme Court's exercise of limited common law power to review agency actions, *see* Metzger, *supra* note 6, at 55 ("[T]he Roberts Court has equivocated between textualist and common law approaches to major administrative law statutes.").

37. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1907 (2020); SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943).

explanation.[38] Although commentators correctly noted that review of the adequacy of agency explanations may allow the Court, as in the DACA case, to avoid a potentially divisive decision on the merits,[39] process review at the same time slows down agency action with the goal that final agency action will be thought through more comprehensively.

Consider, as well, the Roberts Court's decision in *Kisor v. Wilkie*,[40] decided the same term as *Department of Commerce*. There, in limiting when courts should defer to an agency's interpretation of its own regulations as previously specified in the *Auer* doctrine,[41] the Court provided two overlapping reasons to justify the new focus on the process preceding the agency's interpretation. First, the agency's interpretation must be authoritative in that "the interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."[42] Interpretations reached by lower level officials generally lack the power to bind the general public, and higher level officials in contrast are subject more to checks of the political process—presidential oversight and congressional oversight, or at least that from agency heads.[43] The requirement that the agency interpretation be "authoritative" can promote political accountability.

Yet, the Court continued that it would only defer to such agency interpretations when they reflect "'fair and considered judgment . . . .' That means . . . that a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.'"[44] Agencies may not consider the long-term ramifications of an interpretation urged in a brief because they are focused on winning a particular case.[45] Forcing the agency to adopt an interpretation that must apply in many contexts requires agencies to consider not only the interpretation in the case before them, but those coming down the road. That concern limits the potential that factors based on the agency's reaction to one particular challenge informs the agency's decision.

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38. *Dep't of Homeland Sec.*, 140 S. Ct. at 1901; *Fox Television*, 556 U.S. at 515.

39. *See* discussion, *supra* note 6.

40. 139 S. Ct. 2400 (2019).

41. Auer v. Robbins, 519 U.S. 452 (1997).

42. 139 S. Ct. at 2416.

43. *See* David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 205 (2001) (stressing the importance of the distinction between higher and lower level decisionmaking).

44. 139 S. Ct. at 2417.

45. *Id.* at n.6.

Kisor's requirements of generality and deliberation curb the potential for arbitrary or ad hoc administrative actions. For instance, in informal rulemaking, the agency publishes a proposed rule relying on particular interpretations of regulations, receives comments on the propriety of the interpretation (as well as on the proposed rule), and thereafter issues a final determination.[46] When the disputed interpretation arises in formal adjudication, both sides typically submit briefs addressing the costs and benefits of any contested interpretation, and any Administrative Law Judge decision as to interpretation is subject to appeal to the agency before the interpretation becomes final.[47] The very process of coming to an internal agreement limits the potential for arbitrary or ad hoc decisions, even if that process has no impact on making the interpretation politically accountable.

Chief Justice Roberts, in concurrence, noted that the factors the majority articulated in determining whether *Auer* deference is appropriate mirrored those that judges used in the past: "The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment."[48] And, with words that he would later use in *Department of Homeland Security*,[49] he continued that "the agency must take account of reliance interests and avoid unfair surprise."[50] Much as with the stress in *Department of Homeland Security* on the need for careful contemporaneous justification before any change in agency position, *Kisor* incentivizes agencies to deliberate more widely before binding the public through regulatory construction.[51] Although interpretations reached through agency deliberation minimize the likelihood of careless agency action, they do not necessarily promote political accountability in the sense used by Eidelson.

Consider the DACA case again. The requirement of considering only contemporaneous justifications might, as Eidelson argues, serve political accountability by focusing the public's attention to one explanation only. On the other hand, the contemporaneity requirement forces agencies to slow down and take more considerate action, minimizing the potential for hasty

46. 5 U.S.C. § 553.

47. *Id.* at §§ 556–57.

48. 139 S. Ct. at 2424.

49. Dept. of Homeland Sec. v. Regents. of Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).

50. 139 S. Ct. at 2424.

51. *Kisor* follows the Court's decision in United States v. Mead Corp., 533 U.S. 218, 229–30 (2001), in which the Court held that courts should defer to agency interpretations of statutes only when those interpretations were reached in a relatively formal and transparent manner. *Id.* at 2416.

decisionmaking, as in *Kisor*.[52] Agencies know that they have only one bite at the apple.[53] Similarly, although buck-passing explanations as forwarded by Acting Secretary Duke may frustrate political accountability, as Eidelson suggests, they also indicate hasty or incomplete analysis by the agency.[54] Likewise, pretextual justifications, as in *Department of Commerce*, no doubt hinder public accountability,[55] but they also suggest that the internal agency process cannot be trusted, much as in the early travel ban litigation.

In sum, Eidelson is on strong ground in rejecting the DACA and *Department of Commerce* decisions simply as instances of judicial minimalism. Nonetheless, his piece is not as persuasive in ascribing to the Court an intent to force agencies to be politically accountable to the public for their decisions. Instead, the DACA case and *Department of Commerce* can be understood—like *Fox Television* and *Kisor*—to incentivize more thorough agency internal decisionmaking. To merit deference, agencies must adhere to a reasoned, deliberate decisionmaking path.[56]

To be sure, a focus on deliberative process converges with political accountability to a certain extent because both turn on reasoned elaboration.[57] The former's goal is to enhance administrative

52. *See generally* 139 S. Ct. 2400 (2019).

53. Moreover, although a contemporaneity requirement may promote political accountability by focusing the public's attention on one explanation, that explanation may not receive as much attention as an earlier statement, as with Attorney General Sessions's declaration that DACA was unconstitutional. Similarly, a presidential statement announcing a particular agency action, such as those often made by President Clinton, might drown out the agency's contemporary justification in the public eye. For some examples, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282–83 (2001) (illustrating in particular with example of President Clinton's announcement of the reasons for banning youth smoking, which differed from those furnished by the Food and Drug Administration).

54. As Eidelson acknowledges, courts long have invalidated agency policymaking when critical aspects of the agency's solution remain unexplored. *See generally Reasoned Explanation*, *supra* note 1. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29 (1983) (refusing to enforce agency's rescission of passive restraint policy for failure to address airbags only option).

55. *Reasoned Explanation*, *supra* note 1, at 1793–94.

56. The Court's more recent decision applying the APA in *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), evinces no concern for public accountability. Rather, in upholding the Federal Communications Commission's decision to loosen rules against cross-ownership of broadcast licenses, the unanimous Court stressed that the "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *Id.* at 1160. The Court concluded that the "agency has acted within a zone of reasonableness." *Id.*

57. Both versions as well counsel against remand without vacatur. *Reasoned Explanation*, *supra* note 1, at 1801–03. Eidelson argues that the concern for political accountability should limit when courts determine, under the APA, that an issue is committed by law to agency discretion, and that this view would be agreed to by anyone believing that judicial review is critical to check administrative action more generally. *Id.* at 1795–1800.

decisionmaking while the latter attempts to ensure that the public is informed as to the *why* of agency action. Courts following either path would invalidate unexplained agency actions, as well as those justified post hoc.

But there are at least two critical differences. First, statements by high level officials may survive the political accountability test, but still suffer from a lack of process.[58] Attorney General Sessions publicly had called for rescission of DACA before Secretary Duke formally took that step.[59] His public stand should not substitute for a more holistic agency consideration of the issue. Indeed, statements from higher up officials may hide the "real" reasons underlying agency action because presidents focus on the politics of the agency action, not on its legality per se.[60] In the parlance of *Kisor*, statements by the Attorney General or President may be authoritative, but still poorly reasoned or even contrived. Process review ensures that the agency's decisionmaking, not the President's post-hoc rationalizations, will be scrutinized.

Second, when agencies supply more than one explanation, the agency process is not necessarily problematic even if, as Eidelson suggests,[61] the public might well be confused. Agencies often take stances for a mixture of reasons, and courts are well positioned to assess whether, taken together, those justifications suffice. For instance, Secretary Nielsen's post hoc justifications for the rescission included a preference for a congressional solution, a concern not to encourage immigration, and the difficulties of proceeding given legal risk.[62] Aside from her failure to address reliance concerns, courts likely would have held that mixture of justifications sufficient even if the public did not know which rationale was most important. And, the FCC in *Fox Television* justified its change in indecency policy for a number of reasons, all examinable in court, but not easily understood by the public.[63] Prodding agencies to be readily understood by the public might result in oversimplification at the expense of thoroughness and candor.

Turn back to Eidelson's metaphor that an elderly relative could distinguish between his decision not to visit her based on his concern that she not contract a contagious disease as opposed to his desire to stay home to watch a TV show.[64] True enough, but perhaps he based his decision on a mixture of reasons. Indeed,

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58. Dept. of Homeland Sec. v. Regents. of Univ. of Cal., 140 S. Ct. 1891, 1903.

59. *Id.*

60. *See supra* note 53 (addressing how President Clinton at times announced agency actions with different rationales than those articulated by the agencies themselves).

61. *See Reasoned Explanation*, *supra* note 1, at 1803–04.

62. *Department of Homeland Security*, 140 S. Ct. at 1905.

63. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517–18 (focusing both on the technological advancements that allowed bleeping of expletives and the concern that a one expletive rule would in fact encourage producers to allow single uses of expletives strategically).

64. *Reasoned Explanation*, *supra* note 1, at 1759.

his relative's disappointment may have been assuaged if she knew that he had considered her potential disappointment, the risk of exposure, and the importance of the TV show in deciding whether to visit. The Supreme Court, through arbitrary and capricious review, requires both that such deliberations precede any final decision and that the final decision be well-reasoned.

Thus, in considering the DACA decision and the Roberts Court's other administrative law decisions, the political accountability explanation is less than convincing. Rather, the Court's stress on process may well arise from its skepticism of administrative power. Process review unquestionably slows down agency action with the hope of protecting the regulated public. As Chief Justice Roberts notably stated, "the Government should turn square corners in dealing with the people"[65] whether or not the public is aware of the agency's internal deliberations. Thus, although the stress on agency process no doubt overlaps with political accountability, the Roberts Court seems poised in the future to limit agency flexibility by demanding thorough process rather than by transforming the APA into "a servant of political accountability."[66]

65. *Department of Homeland Security*, 140 S. Ct. at 1909.

66. *Reasoned Explanation*, *supra* note 1, at 1757–58.