



Written by [Selwyn Duke](#) on February 16, 2018

Rogue Judge Goes Full Unconstitutional

“I can hardly imagine any laws so bad, to which I would not rather be subject than to the caprice of a man,” said British philosopher John Stuart Mill. Yet the caprice of a man was precisely what Americans were subjected to on Tuesday, when a federal judge ruled that while President Trump has the authority to end DACA, he must provide what the court considers “adequate reasons for doing so.”



This courts-über-alles opinion, handed down by Judge Nicholas Garaufis of the United States District Court for the Eastern District of New York, states that Trump must restore the Obama-era Deferred Action for Childhood Arrivals (DACA) program. As the *Washington Times* [reported](#):

[Garaufis] said the administration does have the power to revoke DACA, but it must give a sound reason for doing so — and the Homeland Security Department’s September 2017 rationale fell far short of what is required in that regard.

He even used Mr. Trump’s own tweets as evidence that the DACA program was ended precipitously, pointing to President Trump’s claims that he could “revisit this issue” as proof the program could have been continued.

Judge Garaufis is the second federal judge to rule Mr. Trump’s aides bungled the phaseout, following a case in a federal court in California.

“The question before the court is thus not whether defendants could end the DACA program, but whether they offered legally adequate reasons for doing so,” wrote Judge Garaufis, a Clinton appointee to the court in New York. “Based on its review of the record before it, the court concludes that defendants have not done so.”

This is clearly a case of ruling first and finding the rationale, or, should we say, rationalization, later. Garaufis is, in fact, applying preferential treatment in his recognition of presidential power. DACA was created by Barack Obama in 2012 via executive order, and what can be done by executive order can be undone by executive order — except, apparently, if you’re a president Judge Garaufis doesn’t happen to like.

Even if you believe in the extra-constitutional power of judicial supremacy, it’s understood that judges must rule based on the Constitution, the contract the American people have with one another. Just imagine you owned a 50-percent share in a house with a contract stating you can sell your half any time you wish; then imagine your partner sues you for trying to do so, and the judge rules for him, saying you didn’t have “adequate reasons” for selling. How flabbergasted would you be?

Courts are not super-legislatures or “chief executives” of last resort. Governmental branches don’t need what judges deem “adequate reasons” to exercise their constitutionally granted powers. In fact, government does things for the wrong reasons all the time. Just consider the Johnson Amendment, a 1950s tax-code provision which bars non-profits from endorsing or opposing political candidates. Then-senator Lyndon Johnson pushed it for an entirely self-serving purpose: A wealthy man was using a non-



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profit against him in a re-election campaign. Does this mean the provision should be ruled unconstitutional? (I believe it's unconstitutional for different reasons.) If impure intent were enough to scuttle a government law or measure, how many would remain?

The Constitution provides a basic framework for government, but doesn't prohibit actions backed by "inadequate reasons" or even stupid ones. For who is to judge?

Answer: the people.

If voters determine that an elected official acted based on "inadequate reasons," it's their right and responsibility to vote him from office. When unelected judges usurp that role, this ceases to be a government of, by and for the people. Garaufis has essentially substituted the judgment of one robed lawyer beyond the electorate's reach — himself — for that of tens of millions of citizens.

In reality, Garaufis exhibits inadequate reasoning. He claimed that the president undercut his own legal team, by first saying that the DACA program was unconstitutional but later that "he would consider extending the March 5 deadline," reported the *Times*. "In one September tweet he said that if Congress didn't act, 'I will revisit this issue.'"

This is a contradiction, but so what? Politicians often say one thing and then another (remember John Kerry [being for the Iraq War](#) before he was against it?), and the Constitution says nothing about contradiction in politicking negating constitutional powers.

Garaufis also stated that DACA isn't unconstitutional, but it's not just that Obama himself disagreed. It's that by the judge's own standards, DACA should have been ruled such. Note that Obama also contradicted himself on the program, as the Heritage Foundation [pointed out](#) last year:

Responding in October 2010 to demands that he implement immigration reforms unilaterally, Obama declared, "I am not king. I can't do these things just by myself." In March 2011, he said that with "respect to the notion that I can just suspend deportations through executive order, that's just not the case." In May 2011, he acknowledged that he couldn't "just bypass Congress and change the (immigration) law myself.... That's not how a democracy works."

Yet even though the Democrats controlled the Houses in 2010 and *could have passed any amnesty they wanted*, Obama acted as a "king" and did it himself, anyway. What say you, Judge Garaufis? Didn't Obama undercut his position?

It's bad enough when judges treat the Constitution as a "living document" and interpret it "to suit the times" (which usually just means the *New York Times*). Increasingly, however, judges don't even feel the need to reference spun law. For example, a judge last year [struck down](#) Trump's ban on immigration from terrorist-spawning countries — under the pretext that the prohibition causes "harm" — even though the law clearly grants the president the power to effect such an action. Of course, it's hard to think of a law that doesn't harm someone, and the Constitution does not prohibit such harm.

The *Times* also reported that Garaufis "said the administration doesn't have to approve any specific DACA applications. But it must begin to process applications again" and that it "can still rescind the program in the future if it does it the right way." How magnanimous of you, Emperor.

Here's a better idea: Since judicial supremacy isn't in the Constitution — and since Thomas Jefferson warned that such a power would beget a judicial "oligarchy" that would render the Constitution an "act of suicide" — the president and governors could lawfully ignore unconstitutional, usurpative court rulings. And they could start with Judge Garaufis' opinion. After all, he certainly didn't have "adequate



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reasons” for issuing it.



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