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Has Gorsuch ‘Gone Wobbly’ Already?

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A Supreme Court decision on immigration that was not expected to be controversial instead attracted wide attention upon its release last week. The reason: Justice Neil Gorsuch, the much-heralded successor to the legendary Antonin Scalia, joined with the High Court’s four liberals to overturn an immigration statute on the grounds that it was “void for vagueness,” over the strenuous dissent of the court’s conservative bloc: Justices Clarence Thomas, Samuel Alito, and Anthony Kennedy, and Chief Justice John Roberts.

The majority in Sessions v. Dimaya held that the catch-all (or “residual clause”) definition of the term “crime of violence”—any felony other than enumerated offenses involving “a substantial risk that physical force against the person or property of another” may be used—was too vague to be enforced. Hence, by a 5-4 vote, the court halted the deportation of a noncitizen serial felon twice convicted of first-degree burglary.

The press corps generally reacted with a “man bites dog” lede, focusing on Gorsuch’s defection from the conservative bloc. Many news reports mentioned how the majority relied on a 2015 decision written by Scalia (decided by an 8-1 vote, with only Alito dissenting), Johnson v. United States, which held that a criminal statute authorizing enhanced prison sentences for the commission of a “violent felony” was void for vagueness.

Surprisingly, many legal scholars—even those on the Right—have applauded Gorsuch’s decision in Dimaya. I disagree. Even though I am a Gorsuch fan (e.g., here and here), I believe the dissenters in Dimaya were correct. Confusingly, the justices issued four separate opinions—the majority opinion by Justice Elena Kagan, a concurring opinion by Gorsuch, and lengthy dissents penned by Roberts and Thomas—totaling 96 pages.

That’s a lot to unpack in a short space. As a policy matter, legislators should write statutes as clearly as possible, so that those subject to the law have fair notice of its commands. This principle is especially important in penal statutes, when imprisonment is a possibility.

What the Constitution Says About “Vagueness”

The problem, however, is the Constitution does not necessarily dictate the “ideal” result from a policy standpoint. “Originalism,” which the court’s conservatives purport to follow, means that the Constitution should be interpreted in accordance with its original meaning, not based on the justices’ personal policy preferences.

The Constitution—itself full of imprecise terms such as “unreasonable searches and seizures”—does not address the subject of “vagueness.” The court’s “void for vagueness” case law (of which Johnson is an example) is based on the due process clause of the Fifth Amendment, but the most straightforward view is that the Framers understood “due process” to require only procedural fairness (such as an impartial hearing). A poorly drafted statute will rarely result in a denial of procedural due process, as Justice Alito explained in his dissent in Johnson. Johnson is not dispositive in any event.

Unlike Johnson, Dimaya was an immigration case, not a criminal case. The statute in question, Section 16(b) of the Immigration and Nationality Act (INA), authorizes the deportation of foreign nationals who are convicted of specified violent crimes. Deportation—a civil matter—is not the same as imprisonment, and foreign nationals do not enjoy the same constitutional rights as citizens. Even if Johnson was correctly decided (and I think Alito’s dissent makes the far stronger case), it does not support—let alone compel—the result in Dimaya. A noncitizen facing deportation from the United States for committing aggravated felonies (as defined in the INA) is not entitled to the same “due process” as a citizen charged with a felony, facing either imprisonment or an enhanced prison sentence.

As the dissenters in Dimaya painstakingly explained, Johnson simply does not support the holding in Dimaya. Kagan’s decision, which Thomas’s dissent deemed “triply flawed,” is an activist travesty.

Daniel Horowitz, author of the 2016 book Stolen Sovereignty, convincingly argues that courts should—and traditionally have—deferred to the political branches in cases involving immigration and foreign relations. The Framers (and the court itself, in precedents going back to the 19th century) understood deportation to be an extension of national sovereignty, warranting no due process. The executive was properly thought to have “plenary power” to deport (or, in the parlance of the INA, “remove”) foreign nationals on specified grounds.

Gorsuch conceded in his concurring opinion that “the Executive enjoys considerable constitutional authority” in these areas, but could not resist the temptation unnecessarily to meddle in deportation proceedings. In a disturbing footnote, Gorsuch suggests that aliens are entitled to due process in deportation proceedings—a radical (and potentially disastrous) holding.

Misplaced Praise for Gorsuch

Dimaya is a not a hard case, as the alignment of the sometimes-fickle Justice Kennedy with the court’s reliable conservatives plainly demonstrates. Why, then, did so many right-of-center scholars praise Gorsuch’s erroneous decision? (E.g., here, here, here, here, here, and here.) At the risk of stepping on some toes, I’ll offer several theories, in no particular order of primacy.

Libertarians, who greatly outnumber traditional conservatives in the legal academy, place little importance on maintaining national sovereignty; indeed, the leading libertarian think tank, the Cato Institute, unabashedly advocates open borders. Libertarians at Cato and elsewhere also support an aggressive judicial role in overseeing the political branches (sometimes called

“judicial engagement”). Result-oriented scholars tend to cheerlead for judges doing their bidding, and Beltway pundits and think tanks serve as the cheerleading squad.

Moreover, the current generation of right-of-center legal scholars (even the small number of conservatives and classical liberals) have largely abandoned the “judicial restraint” advanced by Robert Bork and Lino Graglia in favor of a “new originalism” that critics contend is just a disguised version of the Left’s “living Constitution,” allowing inventive constitutional law theorists to devise pseudo-historical arguments justifying policy outcomes they find congenial. Skeptics sometimes deride this as “law office history.”

Sadly, the faculties at elite law schools are so overwhelmingly leftist that the beleaguered minority of center-right scholars, in an apparent display of the Stockholm Syndrome, begin to mimic the attitudes and beliefs of the dominant cohort—shifting the intellectual playing field ever leftward.

And, to be fair, some well-intentioned opponents of the administrative state sincerely view Gorsuch’s aggressive approach as a useful weapon in the overdue battle to rein in the federal Leviathan and restore some semblance of the separation of powers envisioned by the Framers. The ends will justify the means, they naively hope. In the past, however, activist judges have created far more problems (and more Big Government) than they have solved.

The question remains: Why would Gorsuch, still a rookie on the Court, abandon his veteran colleagues (especially Thomas and Alito, both unflinching stalwarts) to join with the court’s liberals? The answer may lie in the Sirens’ song of admiring right-of-center pundits, who have been wooing Gorsuch with adulatory coverage during his short tenure on the High Court. Gorsuch’s adoring fans have portrayed him as the intrepid jurist who will slay “Chevron deference” (the bête noir of administrative law critics) and restore the rule of law. Gorsuch may have let this over-the-top flattery go to his head. Unfortunately, few commentators (Mark Levin and Daniel Horowitz excepted) have criticized Gorsuch’s perfidy in Dimaya.

In the past, when conservative justices such as Anthony Kennedy softened their views to win the praise of New York Times reporter Linda Greenhouse, the phenomenon was dubbed “the Greenhouse Effect.” Perhaps Gorsuch’s opinion in Dimaya is an example of “the Cato Effect.” Frankly, I hope Gorsuch snaps out of it and regains his bearings, lest he replace Kennedy as the court’s unpredictable flip-flopper. Like Ulysses in Homer’s Odyssey, Gorsuch may need to lash himself to the mast of judicial restraint to avoid such temptations in the future.