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On Trump's travel ban executive order, Gorsuch is more likely to oppose it than Garland

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Regardless of what ultimately happens to President Trump's executive order on immigration — Thursday night's ruling to maintain the restraining order blocking the ban obviously isn't the end — an irony of the political debate over the parallel Supreme Court nomination is that Neil Gorsuch would be more likely to rule against the government than Merrick Garland would've been.

Let me explain. Garland was a so-called "moderate" liberal, who had a long career as a prosecutor and Justice Department official before becoming a judge. What this translates to on the bench is that he's extremely solicitous of assertions of federal power. Whether environmental regulation or labor law, law enforcement interests or immigration prerogatives, he's a solid vote for the government. More solid, I should add, than someone who's more ideological, like Justice Sonia Sotomayor or a Goodwin Liu (a California supreme court justice whose appointment to the 9th Circuit Republicans had blocked).

Gorsuch, on the other hand, has led a campaign against judicial over-deference to the executive. In a 2015 case called *De Niz Robles v. Lynch*, Gorsuch cited principles of equal protection and due process to hold that "the more an agency acts like a legislator — announcing new rules of general applicability — the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct." Accordingly, he ruled against the ad hoc government action, and for an illegal-immigrant petitioner.

So too in last August's *Gutierrez-Brizuela v. Lynch*, where Gorsuch wrote a concurrence to his own majority opinion (which shows that he understands the judicial role but also thinks more deeply about the law). "There's an elephant in the room with us today," he began. "But the fact is [broad deference doctrines] permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth." So again the government lost, because it overreached.

I'm not going to do justice here to the full debate over administrative law (*Chevron*, etc.), but suffice it to say that in this pen-and-phone era, it's refreshing to see a judge recognize the lack of accountability in a system driven by bureaucrats rather than legislators. It's not something one would expect from a "judicial restraint" conservative, and differentiates Gorsuch from Garland (and from the late Justice Antonin Scalia, for that matter).

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