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PERSPECTIVE

Sometimes, it's good to be wrong: Gorsuch's surprise vote

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Justice Neil Gorsuch speaks in front of President Donald Trump during his swearing-in ceremony in Washington, April 10, 2017. Earlier this month, Gorsuch surprised many court watchers by casting his vote alongside the liberal block of the Supreme Court.

On April 17, the U.S. Supreme Court invalidated the residual clause of the Immigration and Nationality Act's definition of "aggravated felony" in *Sessions v. Dimaya*, 2018 DJDAR 3331. While it's never fun being wrong when predicting how the justices are likely to rule, sometimes it is a welcome surprise.

In September, we predicted a conservative outcome upholding the INA's incorporation of 18 U.S.C. Section 16(b)'s definition of "crime of violence" into the act's own definition of aggravated felony. ("Precision in immigration law is paramount," Sept. 26, 2017.) In the case of Dimaya, a lawful U.S. resident since 1992, an immigration judge found him ineligible to seek discretionary relief from deportation because he had been twice convicted in California court of first-degree burglary, crimes that fell under Section 16(b)'s definition, which includes any felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." On appeal, Dimaya argued that this definition is so vague as to be unconstitutional. The late Judge Stephen Reinhardt writing for the 9th U.S. Circuit Court of Appeals agreed, finding that the Supreme Court's 2015 decision in *Johnson v. United States*, which invalidated nearly identical language in the Armed Career Criminal Act, controlled the outcome.

We were concerned that the addition of Justice Neil Gorsuch would lead to a conservative result, with the Supreme Court declining to follow *Johnson* in the immigration context, notwithstanding that Justice Antonin Scalia was *Johnson*'s author and that Chief Justice John Roberts joined that majority opinion in full. This was, in part, because the court first heard the case during its 2016 term with only eight justices, following Scalia's death, and then ordered re-argument for this term, strongly suggesting a four-to-four divide. Hence, it appeared that the outcome hinged on the vote of President Donald Trump's newly minted junior justice.

And indeed, Gorsuch cast the deciding vote, but in favor of Dimaya. Justice Elena Kagan writing for the court held that *Johnson* controls, plain and simple. Like the ACCA's "residual clause" definition of "crime of violence" invalidated in *Johnson*, the language challenged by Dimaya was found unconstitutional, because it asked judges to engage in two indeterminate inquiries: First, judges must assess the risk of injury involved in an imagined "usual" or "ordinary" violation of a given criminal statute, and second, judges must determine exactly how much risk it takes for the crime to qualify as a violent felony, i.e. how much risk is a "substantial risk." The "grave uncertainty" resulting from the intersection of these two judicial guessing games made Section 16(b)'s definition void, just as it had the ACCA's "residual clause" in *Johnson*. None of the "minor linguistic disparities" between the ACCA's residual clause and Section 16(b) were found to be material.

Kagan rejected the government's argument that civil deportation required less clarity, reaffirming the Supreme Court's 1951 decision in *Jordan v. De George*, which had applied the criminal vagueness standard to an immigration statute "in view of the grave nature of deportation." Interestingly, Gorsuch did not join this portion of Kagan's opinion. Instead, he wrote separately to note that the prohibition on vague laws was historically sound and rooted in traditional notions of fair notice and due process at common law. Under Gorsuch's view, the government may not take "life, liberty, or property" under a vague law, regardless of whether the proceedings are criminal or civil in nature. In his view, the severity of deportation is not so different from other severe consequences that can result from civil proceedings, including harsh fines, home forfeiture, loss of professional licenses, and even indefinite commitment. According to Gorsuch, all of these laws must be defined with the same level of clarity as any criminal statute. This more expansive version of the due process protection against vague laws might invite new challenges both liberal and conservative in nature, especially where administrative agencies have been tasked by Congress with carrying out broad ill-defined mandates.

Chief Justice Roberts wrote the principal dissent, in which Justices Clarence Thomas, Anthony Kennedy and Samuel Alito joined. He did not reach the question of whether the stricter criminal vagueness standard should apply here: Even under that strict standard he would have found that Section 16(b) definition passed muster. Roberts distinguished *Johnson* based on

the "minor linguistic disparities" dismissed by the majority. But Robert's dissent fails to address the key problem identified by *Johnson*, where judges are expected to imagine an "ordinary" commission of the crime at issue. Dimaya's offense is illustrative: California's capacious burglary statute equally covers armed home intruders and door-to-door salesmen peddling shady products. And Dimaya himself committed no acts of violence in the commission of his crimes.

In a separate dissent, Thomas arrived at an historical view opposite to that of Gorsuch. Not only did the original meaning of the due process clause allow for vague laws, but that clause should not necessarily be understood to apply to aliens at all, regardless of their lawful status in the United States. For this latter point, Thomas relied on the 1798 passage of the Alien and Sedition Acts, which gave the president plenary authority to expel any alien at his discretion and without process. While originalists typically imbue the acts of the first Congress with special significance, Gorsuch rejected Thomas' reliance on the statute out of hand, noting that it "is one of the most notorious laws in our country's history," that it "was widely condemned as unconstitutional by Madison and many others," and that it went unenforced during its brief two-year lifespan. The rift between the two is notable, because even in Gorsuch's brief tenure he has regularly joined Thomas' separate writings.

It is important to emphasize that this result does not mean that Dimaya may stay in the United States, rather it simply means he is now entitled to seek certain forms of discretionary relief from deportation that are unavailable to those convicted of aggravated felonies. And the definition of aggravated felony has not been invalidated in toto, rather individuals convicted of crimes clearly enumerated in the INA, such as murder, rape and drug trafficking, to name only a few off of the long list, are still subject to mandatory deportation. The win is still substantial for immigration activists, as the definition in Section 16(b) is incorporated into many provisions of the INA. Where these provisions mandate deportation or criminal consequences, they are now destined for invalidation under Dimaya.

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