



Gorsuch Explains His Vote in Deportation Case: “The Constitution Demands More”

Justice Neil Gorsuch (shown), who was appointed to the Supreme Court by President Trump, cast the deciding vote in a 5-4 decision on April 17 that invalidated a provision of federal law that requires the mandatory deportation of aliens who have been convicted of some “crimes of violence.” The majority of justices held that the law is unconstitutionally too vague to be enforced. Many media reports on this decision have expressed surprise that Gorsuch — who is considered to be a conservative justice, would vote with the four liberal justices to invalidate a law that the Trump administration’s attorney general attempted to use to enforce federal immigration law.



However, those who attempt to view all judicial and political matters through a “liberal-conservative” lens are likely to miss the point when looking at this decision. It was because these terms have become largely meaningless that this magazine some time ago stopped referring to its editorial stance as “conservative” in favor of the more meaningful, “constitutionalist.”

In the case, *Sessions v. Dimaya*, the High Court was asked to settle the question of whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, is unconstitutionally vague. (18 U.S.C. 16(b) defines what the term “crime of violence” means.)

The petitioner in the case was Attorney General Jeff Sessions; the respondent was James Garcia Dimaya, whom the government sought to deport after his second first-degree burglary conviction in California.

The Supreme Court first heard oral argument in *Dimaya* last year, but was unable to reach a decision before the close of last year’s session and calendared the case for re-argument.

Many conservatives will undoubtedly be dismayed by Gorsuch’s vote, viewing it as contrary to what they expected from a Trump appointee. However, it is necessary for the constitutionalist to look beyond what is politically expedient to understand the thinking of those who realize that our founders wrote the Constitution to limit government, not to empower it.

Gorsuch said in his concurring opinion:

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown’s abuse of “pretended” crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today’s vague laws may



Written by [Warren Mass](#) on April 18, 2018

not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up. The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien’s crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law’s silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

Gorsuch went on to quote his predecessor, the late Associate Justice Antonin Scalia, who in writing for the court in *Johnson v. United States*, held the residual clause of the Armed Career Criminal Act void for vagueness because it invited “more unpredictability and arbitrariness” than the Constitution allows.

In an article about the decision for Breitbart News, Joel B. Pollak describes Gorsuch’s judicial philosophy as “originalist,” noting:

Gorsuch’s opinion is not a case of yet another Republican appointee to the Supreme Court going liberal. Rather, it is analogous to Justice Antonin Scalia’s dissent in *Hamdi v. Rumsfeld* (2004), in which the original originalist voted against President George W. Bush because he believed that the Constitution forbade the government from holding an American citizen — even one accused of fighting alongside our terrorist enemies — without charge.

These cases both remind us that originalists will sometimes disagree in their conclusions, even if they agree in their methods.

Pollak concludes: “Far from violating the trust under which he was appointed, Gorsuch is fulfilling his commitment to originalism.”

Back in February 2017, the *Washington Post* published an article observing that Republicans were delighted with Gorsuch’s selection as Trump’s Supreme Court nominee because “he’s a demonstrated originalist.” To explain what is meant by this term, the writer quoted from another article by the *Post*’s Supreme Court reporter, Robert Barnes, who offered this definition:

Like [the man whose seat he’d assume, the late Justice Antonin] Scalia, Gorsuch is a proponent of originalism — meaning that judges should attempt to interpret the words of the Constitution as they were understood at the time they were written — and a textualist who considers only the words of the law being reviewed, not legislators’ intent or the consequences of the decision.

Our history books often used the term “strict constructionist” to describe the philosophy that the Constitution should be interpreted to reflect what its authors meant literally. Whether one calls Gorsuch a “strict constructionist” or an “originalist,” conservatives intent on enforcing our immigration law should not read too much into his vote with the liberal wing of the Supreme Court. It does not necessarily mean that Gorsuch is weak on immigration law, but, rather, strong on the Constitution. If the law, as Gorsuch insists, is vague, then the remedy is to rewrite the law to make it more specific.

Photo of Justice Neil Gorsuch: AP Images



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