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Judge Gorsuch and the Future of Immigration Deference

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Introduction

If the first couple of months of the Trump Administration are any guide, immigration will be front and center before the Supreme Court in coming terms. How a future Justice Gorsuch might rule on the thorny questions of administrative law, due process, and executive power that these cases raise will turn on how much deference he believes the judiciary owes to the political branches' immigration decisions. The courts traditionally review the constitutionality of immigration action under a hyperdeferential standard—meaning that legislative classifications and exercises of discretion that would be patently unconstitutional in other contexts are perfectly permissible when it comes to noncitizens.[1] And Congress limited the courts' jurisdiction to questions of law, almost totally insulating factfinding and exercises of discretion.[2] With a significant exception where he invalidated a retroactive Board of Immigration Appeals (BIA) rulemaking,[3] Judge Gorsuch has embraced this arrangement and would likely continue to do so on the Court. This Essay considers two illustrative sets of his opinions: one on judicial review of immigration agency action and another on the interaction of immigration and criminal law.

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1. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 794-95, 799-800 (1977) (upholding immigration legislation that drew classifications on the basis of sex and legitimacy under a "facially legitimate and bona fide" standard (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972))).

2. 8 U.S.C. § 1252(a)(2)(B) (2015) ("[N]o court shall have jurisdiction to review . . . decision[s] or action[s] . . . specified under this subchapter to be in the discretion of the Attorney General . . . .").

3. De Niz Robles v. Lynch, 803 F.3d 1165, 1167, 1180 (10th Cir. 2015) (overruling the BIA's retroactive application of a rule barring certain noncitizens from receiving an adjustment of status); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143-44, 1148-49 (10th Cir. 2016) (overruling the BIA's application of the same rule to a noncitizen who applied for relief after the BIA changed its rule but before the new rule was upheld).

I. Limits on Judicial Review of Immigration Decisions

In his immigration opinions, Judge Gorsuch has carefully observed the strict line separating judicial review of questions of law and questions of discretion or policy. As he put it in *Montano-Vega v. Holder*, "[u]nless some violation of law is involved, the business of deciding the sometimes hard, often fine, and nearly always contestable questions of immigration policy belongs to the legislature and executive, not the courts."[4] If the line between law and discretion seems an obvious one, consider that the Immigration and Nationality Act (INA) makes nearly all relevant decisions at every stage of a removal proceeding discretionary—from whether a detained noncitizen should be released on bail to whether a removable noncitizen should receive most types of relief from deportation.[5] And the Constitution itself affords noncitizens little protection: noncitizens are entitled only to "minimal procedural due process" protections.[6] When it comes to immigration, discretion means everything.

Another opinion written by Judge Gorsuch illustrates this line drawing in practice. In *Iliev v. Holder*, which concerned a noncitizen charged with entering a fraudulent marriage to obtain a visa, Judge Gorsuch held that the court "possess[ed] jurisdiction to review Mr. Iliev's petition to the extent it contend[ed] the BIA applied an incorrect legal rule to his case."[7] But Judge Gorsuch decided that the court's power to grant relief ended there. He then held that the court "lack[ed] jurisdiction to review the balance of Mr. Iliev's petition because deciding it would require [the court] to pass on the BIA's credibility determinations and the weight the Board gave to certain pieces of evidence—something Congress has expressly denied this court the power to do."[8] This distinction is not without its problems; "mixed" questions of law and fact muddy it. Judge Gorsuch in *Iliev* explicitly added that the court expressed no view on its jurisdiction to review "the legal sufficiency of the government's evidence, taken on its own terms, to warrant" the agency's conclusion that Iliev's marriage was fraudulent.[9] It is easy to come up with harder cases, too: If an agency apparently ignored the great weight of evidence, at what point would that become a legal error rather than a discretionary exercise?

Constitutional review is also quite limited in the immigration context. Imagine, say, that the President, after making a slew of unsettling public statements about Islam, halted admissions from several majority-Muslim

4. 721 F.3d 1175, 1178 (10th Cir. 2013).

5. 8 U.S.C. § 1226(a)(2)(A) (making bail discretionary); *id.* § 1229b (making cancellation of removal discretionary).

6. *Montano-Vega*, 721 F.3d at 1178-79 (quoting Arambula-Medina v. Holder, 572 F.3d 824, 828 (10th Cir. 2009)).

7. 613 F.3d 1019, 1021-22 (10th Cir. 2010).

8. *Id.* at 1022.

9. *Id.* at 1021, 1026.

countries, claiming in an executive order that entry by nationals of those countries would be "detrimental to the interests of the United States." In any other setting, the courts would rebuke the executive branch for open disregard of bedrock First Amendment principles. Where the border is concerned, though, these actions might be subject only to extremely limited review under the "facially legitimate and bona fide" test.[10] Judge Gorsuch's opinions tell us little about where he would draw the constitutional line to constrain this discretionary power.

Notwithstanding the deferential posture he takes in judging immigration cases, Judge Gorsuch has recognized the hardships the current system imposes on noncitizens. In one case, after receiving an incoherent brief from an immigration lawyer, Judge Gorsuch reviewed the attorney's past filings, discovered chronic incompetence, and initiated disciplinary proceedings.[11] This extraordinary step is significant, given how susceptible noncitizens are to scam lawyers. And in *Montano-Vega*, Judge Gorsuch acknowledged that the petitioner faced a "hard choice" between accepting deportation, thus giving up a pending appeal that might win relief, or staying in the country to pursue that appeal, thus accruing unlawful presence in the United States that would trigger more severe immigration consequences.[12] Still, whatever these cases suggest about Judge Gorsuch's feelings about the nation's immigration policies, they have little to say about his view of the judicial role. He was crystal-clear in *Montano-Vega* that it is not the judiciary's business to "amend, revise, or undo administrative regulations just because they may not be to a litigant's liking or [the court's] own."[13]

The open question is how far Judge Gorsuch will extend his logic in the one instance where he has taken the BIA to task: where the BIA imposed retroactive rules.[14] In *De Niz Robles v. Lynch*, Judge Gorsuch mounted a powerful separation of powers critique of the BIA's retroactive application of rules announced in

10. *Compare* Kleindienst v. Mandel, 408 U.S. 753, 768-69 (1972) (upholding the executive branch's power to exclude noncitizens even if First Amendment rights are implicated), *with* Washington v. Trump, No. 17-35105, 2017 WL 526497, at *10 (9th Cir. Feb. 9, 2017) (reserving the question whether President Trump's executive order barring entry of nationals of seven majority-Muslim countries violated the First Amendment).

11. Alejandre-Gallegos v. Holder, 598 F. App'x 604, 605-06 (10th Cir. 2015).

12. Montano-Vega v. Holder, 721 F.3d 1175, 1177 (10th Cir. 2013) (citing 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (imposing a ten-year bar on readmission for aliens who have "departed the United States while an order of removal was outstanding"); and *id.* § 1182(a)(9)(B)(i)(II) (imposing a ten-year bar on reentry for noncitizens "unlawfully present in the United States for one year or more")).

13. *Id.* at 1178.

14. *See* cases cited *supra* note 3.

adjudication;[15] because Judge Gorsuch was bound by *Chevron*[16] and *Brand X*,[17] though, the holding in *De Niz Robles* ultimately rests on equal protection and due process principles.[18] Another essay in this collection covers what his opinions on retroactive rulemaking portend for administrative law more broadly[19]—*Chevron*'s days might be numbered[20]—but it suffices here to say that this gives one hint how Judge Gorsuch might draw the law/policy line in the future: arguments against the administrative state based on separation of powers principles may carry the day. Given that the BIA more typically proceeds by adjudication than by rulemaking, though, it is uncertain how much effect this sea change would have on the immigration agencies.

II. "Crimmigration" and the Judiciary

A confirmed Justice Gorsuch would also regularly be called upon to adjudicate the immigration consequences of criminal convictions—often called "crimmigration" cases.[21] Most criminal convictions arise under state law, meaning that federal courts must consider how state criminal appeals interact with contemporaneous immigration proceedings as well as the effect *state* convictions should have under *federal* immigration law. Two of Judge Gorsuch's opinions provide guides to his views: one opinion on the extent of a noncitizen's entitlement to review of state court criminal convictions prior to deportation and the second opinion on the categorical rule.

Regarding the availability of habeas review of state court convictions prior to deportation, Judge Gorsuch accepted Congress's broad latitude to structure

15. 803 F.3d 1165, 1170 (10th Cir. 2015) (noting that "the presumption of retroactivity attaching to judicial decisions . . . inheres in [the] separation of powers," as compared to prospective "legislation" such as the BIA's exercise of rulemaking authority).

16. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (setting forth the familiar standard of deference to agency interpretations of ambiguous statutes).

17. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (requiring courts to give *Chevron* deference to agency interpretations even where the interpretation conflicts with judicial precedent, unless that precedent held that the statute unambiguously foreclosed the agency's reading).

18. *De Niz Robles*, 803 F.3d at 1174 ("And it seems to us that looking directly to the underlying due process and equal protection concerns that traditionally attend retroactive lawmaking would lead us to the same conclusion [that the retroactive rulemaking is unlawful] in any event.").

19. *See* Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171 (2017).

20. *See* Gutierriez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

21. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 418-19 (2006) (discussing "the convergence of immigration and criminal law" and its consequences).

the immigration appeals process, even where unfairness might result.[22] The case, *United States v. Adame-Orozco*, involved a then-lawful permanent resident who pleaded guilty in Kansas state court to two drug offenses, apparently unaware that these would make him deportable as an "aggravated felon."[23] He was subsequently put into removal proceedings.[24] He sought state collateral review, claiming ineffective assistance of counsel, but was ordered deported while the state proceeding was pending.[25] Years later, Adame-Orozco reentered the United States and was placed into criminal proceedings for illegal reentry, where he sought to challenge the validity of his original order of removal based on his inability to seek collateral review.[26]

Judge Gorsuch rejected the claim, holding that if "Congress had essentially wished to take the step of affording aliens convicted of aggravated felonies with an automatic stay of deportation pending the completion of appellate and collateral review of their convictions, it knew well how to do so explicitly, rather than leave the job to judicial implication."[27] Fair enough. But this holding severely constrains a noncitizen's opportunities for review. Judge Gorsuch suggested that Adame-Orozco could "petition for habeas relief in the normal course"[28]—normal, save that he had to fight his case from abroad. Even if Adame-Orozco *had* succeeded in overturning his convictions on collateral review from elsewhere, BIA regulations would nonetheless have barred him from seeking to challenge the validity of his removal order while abroad—something Judge Gorsuch dismisses in a footnote by suggesting that "the Executive can and sometimes may facilitate the return to the United States of aliens" who succeed on collateral proceedings.[29] This effectively means that a noncitizen who succeeded in overturning the convictions that made him deportable *might still be denied reentry* absent executive grace.

Judge Gorsuch's law/policy distinction will be particularly important to another frequently litigated crimmigration doctrine: the categorical rule. Developed to establish the consequences of state convictions in federal adjudications, the categorical rule requires comparison of a particular state offense's elements to the elements of the "generic federal offense."[30] "If the

22. The Supreme Court's opinion in *United States v. Mendoza-Lopez* sets an outer bound on deprivations of review, holding that a noncitizen cannot be held criminally liable for violating a deportation order if he has no opportunity to seek judicial review of the order. 481 U.S. 828, 837-38 (1987).

23. 607 F.3d 647, 648-49 (10th Cir. 2010).

24. *Id.*

25. *Id.* at 649-50.

26. *Id.* at 650.

27. *Id.* at 653-54.

28. *Id.* at 655.

29. *Id.* at 655 n.10.

30. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

relevant statute has the same elements as the 'generic' . . . crime, then the prior conviction" triggers immigration consequences; state crimes that sweep more broadly do not. [31] So, for example, the Supreme Court has determined that "generic" burglary has as its elements "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[32] State statutes that criminalize entering "boats and cars" as well as structures do not categorically match and therefore cannot result in immigration consequences.[33] The categorical rule promotes uniformity and predictability in immigration adjudication, ensuring that convictions for the same offense result in identical consequences,[34] with a background Sixth Amendment justification of protecting the jury's factfinding role.[35]

Judge Gorsuch's only opinion applying the categorical rule unfortunately does not shed much light on how he will approach these issues. The case, *United States v. Huizar*, which reviewed a sentencing enhancement in an illegal reentry case,[36] arose from a peculiarity of California burglary law, namely that California's penal code does not require proof that the burgled place was a dwelling or that the burglar's entry was unlawful or unprivileged.[37] To make a categorical match under federal law, the Court had already said in *Taylor*, state burglary laws must require proof that the defendant entered a structure unlawfully.[38] The Tenth Circuit reversed the district court's enhancement on grounds that California's burglary statute did not constitute a categorical match with the generic offense, so the burglary could not trigger the enhancement. [39] Because the Supreme Court had on-point precedent as to burglary and because the appeal came from a district court (rather than the BIA), the *Huizar* opinion did not reach some of the frontiers of the categorical rule: the correct method for deriving the generic offense's elements, or whether the courts must defer to reasonable immigration agency decisions about the categorical rule under *Chevron*. The Court's frequent grants of certiorari on categorical rule issues,[40] often in cases where the BIA has construed an arguably ambiguous statute, means that Judge Gorsuch may soon be faced with whether he believes the BIA's reasonable categorical rule determinations merit the judiciary's solicitude.

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31. Descamps v. United States, 133 S. Ct. 2276, 2283 (2013).

32. Taylor v. United States, 495 U.S. 575, 598 (1990).

33. *See* Shepard v. United States, 544 U.S. 13, 17 (2005).

34. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1727-42 (2011).

35. *Descamps*, 133 S. Ct. at 2287.

36. 688 F.3d 1193, 1193-94 (10th Cir. 2012).

37. CAL. PENAL CODE § 459 (West 2016); *Huizar*, 688 F.3d at 1194.

38. Taylor v. United States, 495 U.S. 575, 598-99 (1990).

39. *Huizar*, 688 F.3d at 1194, 1197.

40. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); *Descamps*, 133 S. Ct. at 2281; Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

Two cases pending before the Supreme Court this term raise precisely these issues: *Esquivel-Quintana v. Sessions*[41] and *Sessions v. Dimaya*.[42] The former case concerns whether "sexual abuse of a minor" as defined in the INA categorically excludes state statutory rape laws that criminalize sex between a twenty-one-year-old and someone almost eighteen—and whether the BIA's determination deserves *Chevron* deference.[43] The latter case, on appeal from a Ninth Circuit decision holding that the "crime of violence" provision in the INA is unconstitutionally vague, concerns whether a different vagueness standard applies to civil statutes than to criminal ones.[44] Immigration proceedings are technically civil.[45] Judge Gorsuch's opinions are not much to go by, but he might come out in favor of the noncitizens in both cases, particularly if he is as much Justice Scalia's heir as popular wisdom suggests.[46] Justice Scalia joined most of the Court's recent categorical rule cases,[47] and he adhered to the principle that courts must give statutes with criminal and civil applications the same construction no matter the nature of the proceeding.[48] If Judge Gorsuch follows this lead, then he would reject outright the argument that a different vagueness standard governs in civil contexts than in criminal ones, and he might well decline to defer to the BIA's categorical rule decisions, too.

Conclusion

Judge Gorsuch's approach to immigration cases, with the exception of his administrative law decisions in *De Niz Robles* and *Gutierriez-Brizuela*, closely tracks the judiciary's traditional deference to the political branches on immigration. Precedent and statute both endorse this approach. But there are open questions about constitutional limits on Congress's and the President's powers—limits that President Trump seems determined to test. It remains to be seen whether Judge Gorsuch, if confirmed, would adhere to the position he laid out on the Tenth Circuit when he is inevitably called upon to decide those cases.

41. Esquivel-Quintana v. Lynch, 810 F.3d 1019 (6th Cir.), *cert. granted*, 137 S. Ct. 368 (2016). The caption was adjusted after the change in presidential administration.

42. Dimaya v. Lynch, 803 F.3d 1110 (9th Cir.), *cert. granted*, 137 S. Ct. 31 (2016). The caption was adjusted after the change in presidential administration.

43. Brief for the Petitioner at 4-7, 13, Esquivel-Quintana v. Lynch, No. 16-54 (U.S. Dec. 16, 2016), 2016 WL 7384847.

44. Brief for the Petitioner at 9-12, Lynch v. Dimaya, No. 15-1498 (U.S. Nov. 14, 2016), 2016 WL 6768940.

45. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

46. *See, e.g.*, Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://nyti.ms/2jSR6Ty.

47. *See, e.g.*, Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).

48. *See, e.g.*, United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 519 (1992) (Scalia, J., concurring in the judgment) (giving statutory language identical meanings in the criminal and civil contexts).